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# Supreme Court of the United States

October Term, 1931

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## No. 736

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I. RUDE, PETITIONER,

*vs.*

JOSEPH BUCHHALTER, THE FIRST NATIONAL BANK OF DENVER, A BANKING CORPORATION; G. DEXTER BLOUNT, HARRY SILVERSTEIN AND DAVID ROSNER, CO-PARTNERS DOING BUSINESS AS BLOUNT, SILVERSTEIN AND ROSNER, RESPONDENTS.

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## SUPPLEMENTAL BRIEF IN BEHALF OF RESPONDENTS.

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*Counsel for Respondents, Buchhalter, Blount, Silverstein and Rosner.*

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## SUPPLEMENTAL BRIEF IN BEHALF OF RESPONDENTS.

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### SECTION I.

*Discussion of Right of Court to Award Attorney's Fees In View of "Fee Bill" Enactment.*

MAY IT PLEASE THE COURT:

The Court of Appeals did no more in this cause than to apply to its extraordinary facts that cardinal

and venerable maxim that, "He who seeks equity must do equity."

In our short brief in opposition to certiorari, the nature of this cause was outlined. The sketch will hereinafter be filled in to a full length portrait. For the purpose, however, of immediate discussion, we find the petitioner, notwithstanding his sworn disclaimer of interest in the escrow in question (other than by way of lien), and notwithstanding also his counsel's concession that legal title to said escrow rested in respondent Buchhalter, none the less sought the aid of the Court of Appeals in bringing about a distribution of the proceeds of the escrow, on the basis of joint ownership. The petitioner states on page 38 of his brief in support of certiorari:

> "In the Circuit Court of Appeals Rude asked that the funds and bonds be distributed between him and Buchhalter."

As we have seen, the Court of Appeals characterized the petitioner's suit as "groundless", "unconscionable", "as conceived in bad faith" and that his testimony was "materially false" (page 275, transcript).

In other words, and notwithstanding Rude's corrupt and fraudulent conduct, the court undertook, on his urgent plea, to accord him his proportionate share of the escrow proceeds—not as a legitimate suitor seeking an adjudication as a matter of right, but as a false and corrupt litigant who should be required to make amends for perfidious misconduct. He was given an accounting as a mat-

ter of pure grace, and the requirement exacted that he hold certain of his adversaries harmless from their outlay occasioned solely by himself.

But Rude is not content. He now insists the Court of Appeals should hold him immune from the operation of the time-honored maxim above set out. It is well within the purview of the facts to say that he sought to utilize the District Court as an instrument to effectuate a gross fraud. He supplicated the Court of Appeals to believe the allegations of Buchhalter's answer that he (Rude) was, in truth and in fact, a proportionate owner of the escrow and that his own contrary oaths and allegations should be disregarded and condoned and now asserts that no equities may be exacted of him. He says that because the equity in question took the form of an attorney's fee allowance, that it is anathema and under the ban of the so-called "Fee Bill" Statute (U. S. C. A. Title 28, Secs. 571-572).

It is submitted that the fee bill and cost enactment has never been construed to interfere with the free exercise of either accepted jurisprudence or practice in equity. This matter has long since ceased to rest upon either speculation or conjecture. This Court held in

*Trustees v. Greenough*, 105 U. S. 527-538:

> "The Fee Bill is intended to regulate only those fees and costs which are strictly chargeable as between party and party, and not to regulate the fees of counsel and other expenses and charges as between solicitor and client, nor the power of a court of equity,

in cases of administration of funds under its control, to make such allowance to the parties out of the fund as justice and equity may require."

The case of *Guardian Trust Co., et al., v. Kansas City Southern Ry. Co.* (8 C. C. A.), 28 Fed. (2nd) 233, is, unless it be now overthrown, persuasive authority for the action of the Court of Appeals in the case at bar.

After an elaborate discussion of the power of Federal Courts, as distinguished from mere policy in such cases, and conceding that special facts are requisite for its proper exercise, the Court said (p. 244):

> "We think it may be safely stated, however, that whenever there have come before Federal courts of equity, cases in which special facts showed that, in accordance with well established principles of right and equity, costs 'as between solicitor and client' ought to be allowed, the courts have not refused to make such allowance.
>
> "The most common classes of cases, though by no means exclusive, in which such cost allowances have been made in equity, are:
>
> "Foreclosures of mortgages (citing cases);
>
> "Receiverships (citing cases);
>
> "Suits by stockholders to preserve the property rights of their corporation (citing cases);
>
> "Suits by one or more creditors to preserve and bring into court for admin-

> istration a fund in which they are interested (citing cases);
>
> "Certain classes of proceedings in connection with bankruptcy matters (citing cases).
>
> "Closely akin to the foregoing classes of cases are those involving allowances made to a pledgee for expenses and attorney's fees in preserving and defending the pledged property." (Citing text authority and cases.)

The court then goes on to give still further illustrations, and holds (p. 245) that in a proper case it is not even necessary that there be a fund in court out of which such allowance is ordered paid.

In the case at bar, the respondent Buchhalter has long been deprived of the use of his share of the escrow by the institution of the petitioner Rude's groundless and fraudulent claim of lien. This is closely analogous to seizure by the wrongful appointment of a receiver. It is analogous also to injunction or attachment without bond. In receivership cases, petitioners are charged with all costs and expenses when their application has developed to be baseless or unfounded.

See: *Beach v. Macon Grocery Co.*, 125 Fed. 513 (C. C. A. 5), where the Court said (p. 517):

> "The property having been taken from the defendants against their consent under an erroneous order which they resisted successfully in an appellate court, the only proper course is to return the property without charge of any kind against it or against the

> successful defendants. The defendants should be put in their former condition as nearly as possible, instead of any sum being taxed against the defendants. Under such circumstances they would be entitled in some jurisdictions to recover damages in a proper cause for being deprived of the use of their property. The petitioners who instituted the proceedings and secured the appointment of a receiver are properly and equitably chargeable with the costs and expenses incurred by their wrongful application."

Attorney's fees, as such, do not seem to be specifically mentioned in this case, but assuredly the principle is broad enough to embrace them. We do not multiply authorities on the general subject. They are legion.

We have seen, as specified by the court in the *Guardian Trust Co.* case, *supra*, there are at least six, if not more, established and recognized classes of cases where attorney's fees and expenses are allowed, notwithstanding the fee bill statute or any other enactment.

It was said *In Re Schocket*, 177 Fed. 583, by District Judge Brown (p. 584):

> "A court of equity, in extending an order for the taxation of costs so that it may include charges and expenses properly incurred, seems to proceed rather upon considerations of the substantial equities of the parties than upon ordinary statutory provisions concerning costs."

This court granted certiorari in the *Guardian Trust Company* case *supra*. Its opinion is found in 281 U. S. 1, and the question of attorney's fees was there left open so far as commitment by this court was concerned. But subsequently thereto, and in the case of

*United States v. Equitable Trust Co. of N. Y.*, 283 U. S. 738,

this court, without question of any sort, whether arising under the fee bill statute or as a matter of general equity jurisdiction, awarded the sum of $50,000.00 attorney's fees (reducing the amount from $100,000.00 allowed by the Court of Appeals) and sanctioned the following statement of the law:

> Syll: "A trust fund recovered or preserved through the intervention of courts of equity may ordinarily be charged with costs and expenses, including reasonable attorney's fees, incurred in that behalf," etc., etc.

It is true that this decision perhaps adds nothing, or at least has not extended the scope of the holding in *Trustees v. Greenough, supra*, this latter case expressly deciding that the fee bill statute is inapplicable in such instances.

Certain it is that whatever notions may be entertained as respects other classes of cases, this court is definitely committed to attorney's fee allowances in cases of "recovery or preservation" in equity, of a trust fund.

To return briefly to the *Guardian Trust Company* case (281 U. S. 1, *supra*). The question there

resolved was chiefly the construction of a prior mandate of this court. The language of the decree read (p. 9):

> "The decree here affirmed required the 'taxation of costs * * * under the principles, rules and practice in equity.' It undoubtedly covered ascertainment of amounts taxable between party and party. There was no specific reference to any additional allowance. The language used disclosed no intention to require more than the usual taxation."

Hence it was held that by virtue of the language of the mandate, costs as between solicitor and client were not there included. But this court also further said (p. 9):

> "In actions at law costs follow the result as of course, but in equity costs not otherwise governed by statute are given or withheld in the sound discretion of the court according to the facts and circumstances of the case. * * * Even if it be assumed that federal equity courts have jurisdiction to allow costs as between solicitor and client and to include (p. 10) therein attorneys' fees in excess of the amount prescribed by statute—and as to that we express no opinion—the purpose to authorize such costs should be clearly expressed in the decree."

Although leaving the question of attorney's fees in excess of the amount prescribed by statute open, we have just seen that this court approved a $50,000 attorney's fee allowance in a subsequent case. We

take it, therefore, that at least one exception to the statute stands approved, even though in the some half dozen remaining classes of cases in which such practice has been followed, as pointed out by the Court of Appeals in the *Guardian Trust Company* case (28 Fed. (2nd) 233, *supra*), there has been no definite commitment by this court with respect to those classes. Be it said that the instances are so numerous, the practice so long continued, that the principle of allowing costs as between solicitor and client under special facts, is so deeply imbedded in the equitable jurisprudence of the United States, that it would be at this late day almost revolutionary to eradicate it. It would overturn the established practice in foreclosures, receiverships, certain suits for creditors and stockholders, certain bankruptcy proceedings, as it has been long pursued. Cogent reasons must necessarily exist to authorize such a result. The fee bill statute is either to be construed as an intended limitation upon the inherent powers of courts of equity and enforced accordingly in all classes of cases, or it is not to have attributed to it such an effect in any instance. The statute itself makes no exceptions. The single exception of "recovery or preservation" of a trust fund—if that is to be the only permitted exception—can rest upon neither logic, principle nor statutory language.

Let us come back to the case at bar. As previously pointed out, Rude himself sought equity in the Court of Appeals on a hypothesis completely departing that sought to be utilized by him in the trial court. The Court of Appeals did no more, no less, under the special facts, than to exact what it con-

ceived to be equity from him who sought it. The expenses to which he had unconscionably put his adversaries must be met, and that, out of the escrow in the constructive custody of the court. We find, it is true, no illustrative case under parallel facts invoking the maxim of doing equity in such an instance. There is, indeed, no case of even similar facts, as will become apparent from the discussion of them hereinafter to be made. But similar facts or not, equitable principles are immutable. No identity of facts is required to enforce any equitable maxim. If the Court of Appeals was without jurisdiction in the present instance to exact equity of Rude in the manner stated, then it can only be because the fee bill statute be given the interpretation of operating to destroy its power in such behalf. A Federal court of equity may become of limited functions indeed if such construction be now adopted. In the case at bar, for instance, the court would sink to the low estate of becoming a helpless instrumentality or the mere cat's paw of a litigant found to have been unconscionable in his claims. Besides that, if the recovery or preservation of trust funds be the only permissible exception to the operation of the statute, a very considerable proportion of equity procedure will fall by the wayside, so far as the Federal courts are concerned.

We respectfully submit such far reaching and grave consequences are not to ensue at the instance of one asserting "groundless claims". The equity required to be done in this case—reimbursement for outlay—was not taxed as costs. It does not take the form of personal judgment. It is not collectible

by execution. It is merely a charge on the corpus of the property in the constructive custody of the court.

*State Statutes Allowing Attorney's Fees are Enforced in the Federal Courts, and No Conflict Has Been Found with the Fee Bill Statute.*

Various state statutes allowing recovery of attorney's fees notwithstanding both constitutional objections and the fee bill enactment, have been repeatedly enforced in the Federal courts. (See *Sioux Co. v. National Surety Co.*, 276 U. S. 238, and the cases there cited.) Speaking of this case, this court said (Feb. 15, 1932) in *Henkel v. Chicago, etc., R. Co.*, 284 U. S. ——, 76 L. Ed. p. 334, No. 7 U. S. Supreme Court Advance Opinions:

> "A Nebraska statute provided that in specified classes of cases, including that before the court, the plaintiff on obtaining judgment should be allowed a reasonable sum as an attorney's fee. The requirement was mandatory. This court held that in such a case the attorney's fee was recoverable in the Federal court, but was careful to point out that the amount was 'not costs in the ordinary sense' and hence was 'not within the field of costs litigation covered by the Federal statutes."

See also, *Dohany v. Rogers*, 281 U. S. 362-370.

Unless the Federal statute be given the interpretation that it was an intended restriction upon the inherent power of courts of equity in exacting justice of their suitors, then we assert, it has no

applicability here. If the statute was intended as such a curtailment of power, then no court of equity has a right to award counsel fees either in cases of preservation of trust funds or in other cases. All would be equally under the ban unless anomalies are to be set up and irreconcilable doctrines are to find countenance. It is submitted the Federal statute relating to costs and attorney's fees has no more relationship to the maxim that "He who seeks equity must do equity," than it has to cases involving the recovery or preservation of trust funds or to any other instance of long established and generally accepted equity jurisprudence.

It is respectfully suggested that the doctrine announced by this court in *Ohio Ex Rel Popovici v. Agler*, 280 U. S. 379, 384, can well find application to the instant case. That case involved a construction of Article III, Section 2 of the Constitution relating to the jurisdiction of the courts of the United States—whether a State Court had jurisdiction of a divorce action instituted against a foreign consul. This court said, speaking of that constitutional provision (p. 383):

> "The language, so far as it affects the present case, is pretty sweeping, but like all language, it has to be interpreted in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used."

## SECTION II.

*Review of the Pleadings, the Evidence and a Discussion of the Unclean Hands Doctrine.*

It was our earnest insistence in the trial court and in the Circuit Court of Appeals that the unclean hands doctrine should find, in view of the astonishing facts of this case, unqualified and strict application. It is assumed that this Honorable Court has taken full jurisdiction of this cause, not jurisdiction of one or two matters only of Rude's own designation or selection, as he has apparently contended the Court of Appeals should have done. In any event, the petitioner Rude has attacked certain of the findings of fact as made by the Court of Appeals. He insists (p. 35, brief for certiorari) that there should have been no finding that Rude had not instituted his suit in good faith and says also (p. 37, brief) that Rude did not assert a false and groundless claim.

On our part, we renew our contention that the claim of the petitioner was so unconscionable, so false and so groundless that if the Court of Appeals erred in any regard it was in undertaking to adjudicate Rude's rights at all or to have given him any relief whatsoever, whether absolute or upon condition. This necessitates a review of the pleadings and the evidence, to which we now address ourselves as briefly as may be consistent with a fair exposition of the cause.

*The Pleadings Reviewed.*

This remarkable case had its origin in a bill in equity filed by the plaintiff Rude on or about the

26th day of March, 1930, directed against the appellant Buchhalter, The First National Bank of Denver and Messrs. Blount, Silverstein and Rosner, attorneys at law.

Since the pleaded issues are of determinative importance, it is conceived that a further statement of the case can best be made by a review of the pleadings.

*The Bill.*

Briefly, the bill alleges (pp. 1-6, trans.):

That on August 29, 1929, Rude transferred a one-fourth interest of the Colorado Pulp and Paper Company properties to defendant Buchhalter, "on account of" which, the latter executed and delivered to Rude a promissory note in the sum of $67,500.00 due six months thereafter, with interest at 8 per cent, secured by trust deed of like date. Further, that Rude was to receive from Buchhalter one-half of any realized profits, not to exceed $7,500.00;

That Buchhalter sold the above mentioned one-quarter interest, together with another one-quarter interest of said properties, or a total of one-half interest in said properties, to one Binstock; that to consummate such sale it became necessary for Buchhalter to obtain a release of the trust deed above mentioned; that Rude, on or about November 1, 1929, deposited said note in escrow with The First National Bank of Denver, to be turned over to the purchaser on payment to the bank of all proceeds of the sale, which proceeds were to be held by the bank until Buchhalter and Rude "had agreed in writing as to the disposition of said proceeds";

Paragraph IV (p. 3, trans.) alleges the release of the trust deed and the surrender of the note on November 15, 1929, and that the bank received as the proceeds of said sale, $28,080.50 in money and $92,500.00 in bonds of Colorado Paper Products Company;

Paragraph V alleges that on November 18, 1929, Buchhalter and Rude orally agreed at The First National Bank, that Rude "would be paid at once by said Joseph Buchhalter the full amount of his note and accrued interest in cash, in the sum of $67,500.00 plus accrued interest, together with $7,500.00, which Buchhalter had agreed to pay at the time of the conveyance of the property, plus interest," etc.; that it was further agreed $92,500.00 of bonds should be held as collateral to secure said payment to Rude; that cash of $28,080.00 should be disbursed as follows: $16,365.00 to Rude and $11,615.00 to Buchhalter, this latter, it is alleged, to enable Buchhalter to discharge a note then owing by him to The First National Bank, so that certain collateral owned by Buchhalter might be by said bank released, which collateral, it is alleged, Buchhalter agreed to immediately sell and pay Rude "the baance due him of $59,699.00"; that such disbursements were made by said bank and the Buchhalter note was paid and his collateral released; that "there remains due and unpaid from Buchhalter to Rude $59,699.00," which has been demanded, but without avail.

Paragraph VI (p. 4, trans.) sets forth that The First National Bank holds under this escrow, $90,000.00 in bonds and $2,500.00 in cash; that by reason

of the alleged facts, Rude is entitled to "an equitable lien on said assets to secure the payment in full of said sum due from Buchhalter, and by the terms of said agreements hereinbefore set forth the said assets are pledged and found as collateral to secure to said plaintiff the payment of $59,699.00"; that such payment has been refused; that plaintiff is without adequate legal remedy; that the bank claims a lien to secure a Buchhalter indebtedness of $1,250.00; that the bank has "full knowledge of said escrow and said agreement, and without the knowledge or consent of said Rude"; that the bank's rights are subordinate to Rude's, but it none the less claims priority for its lien, and that the escrow agreement with the bank provides that said assets ($90.000.00 of bonds and $2,500.00 cash) "shall be held by it until such time as I. Rude and Joseph Buchhalter have agreed in writing concerning the disposition thereof."

It is to be especially noted that this escrow agreement is disposed of by plaintiff in his bill, as follows:

> "Plaintiff alleges that they (Rude and Buchhalter) have not agreed in writing and that it is impossible to obtain an agreement in writing concerning the disposition of said cash and bonds; that defendant bank refuses to recognize the lien of plaintiff and refuses to sell said bonds for the purpose of satisfying said lien and refuses to deliver said bonds or cash to plaintiff without the written agreement of Joseph Buchhalter, which it is impossible to obtain."

In other words, it is here alleged the bank refused to do an illegal act, to-wit, violate the escrow agreement at plaintiff's behest, and the suit is brought to require the bank to break an agreement that plaintiff, himself, repudiates, but which he sets forth as the basis of the bank's connection with the subject matter of suit. This, we remark in passing, is a unique door through which to seek entrance into a court of equity.

Paragraph VII (p. 5, trans.) deals with the garnishment claim of Messrs. Blount, Silverstein and Rosner; alleges that these defendants had "full knowledge of the rights of plaintiff and of all the matters set forth in this bill," and alleges that their lien is inferior to that claimed by plaintiff.

The prayer (pp. 5-6, trans.) asks that Rude's alleged lien be declared prior to all others—to that of the bank and the remaining defendants—that the assets in escrow be sold to satisfy a judgment against Buchhalter in the sum of $59,699.00 with interest, etc., said sum having been alleged to be the unpaid balance of the $67,500.00 note.

*Buchhalter's Answer* (pp. 13-22, trans.).

To the foregoing, the defendant Buchhalter filed his separate answer, which we review with what brevity we may, consistent with clarity.

Paragraph I admits citizenship and jurisdictional amount.

Paragraph II (p. 14, trans.) admits the transfer of the property mentioned as of August 29, 1929; alleges that Buchhalter and Rude were at all times

prior thereto, equally interested in said properties; that said transfer was for convenience only to facilitate a sale thereof in the prospective absence of Rude; denies that the alleged note for $67,500.00, or the coincident trust deed were executed on account of or as a consideration for said alleged transfer; avers that such were executed in order to expedite a purchase of said Buchhalter and Rude interests by one Bronstine, then and there and prior thereto, the owner of the remaining one-half interest in said properties; that the trust deed was executed by Buchhalter at Rude's solicitation for the purpose of embarrassing Bronstine in the event of litigation between Rude and Bronstine; that the note of August 29, 1929, and the trust deed as between the parties were fictitious and represented no obligation whatsoever; were delivered to Rude upon his agreement never to seek to enforce or collect the same as against Buchhalter, his heirs or any other person; that the same was to be cancelled and destroyed either upon a sale of said property, or if ineffectual to induce or expedite a sale, then also to be destroyed. The bill's allegation respecting $7,500.00 of profits to be paid Rude is denied, and it is denied that there were any profits; that the only agreement ever existing between Rude and Buchhalter was for a joint division of the proceeds of the sale of said property when such sale might be made; that the respective rights of Buchhalter and Rude were unaltered by the alleged note and trust deed.

Paragraph III (p. 16, trans.) admits the sale to Binstock; avers that such sale was approved in all things by Rude; that the note and trust deed

were cancelled and released; that The First National Bank retains the proceeds subject to the written directions of Buchhalter and Rude, and which directions were given so that Buchhalter and Rude might check up and ascertain their exact and respective interests.

Paragraph IV admits the deposit of funds and bonds in the bank, and the cancellation of the note and trust deed.

Paragraph V denies the entire alleged oral agreement at The First National Bank; denies that Buchhalter ever agreed to pay a $67,500.00 note or any part thereof; denies that Buchhalter ever agreed to pay $7,500.00 as a part consideration of the transfer; alleges that such a recital was placed in a letter to Rude contemporaneously with said pretended transfer so that Rude might exhibit it to his associate, Bronstine, in order to convince the latter that a deal, as distinguished from a colorable transfer, had taken place.

It is further denied that Buchhalter ever agreed that the bonds and funds in The First National Bank were to be allowed to remain there as collateral to any payment whatsoever; denies that any payment was ever agreed to be made; admits the disbursement of a sum of $28,080.00 by the bank, in round number $16,000.00 to Rude and $11,000.00 to Buchhalter; that the reason why Rude received $5,000.00 more than Buchhalter on the occasion in question was to enable Rude to pay the sum of $5,000.00 to Blount, Silverstein and Rosner for attorneys' fees for the joint account of both Buchhalter and Rude;

denies again any indebtedness to Rude; denies any agreement to sell any collateral for Rude's benefit; that Buchhalter's collateral held by the bank consisted only of securities to the approximate value of $6,000.00, all of which Rude well knew. Again repeats the only agreement ever had between Buchhalter and Rude respecting the matter in litigation was to share and share alike in the proceeds of the sale of their joint equitable interests.

Paragraph VI (pp. 19-29, trans.) admits The First National Bank holds said proceeds; denies any lien in favor of Rude or any agreement for any lien; denies any indebtedness to Rude; denies any other liens are secondary; alleges the reason for the parties' inability to agree in writing to the distribution of said assets to be solely due to the fraudulent and corrupt conduct of Rude; further asserts Buchhalter's willingness at all times that Rude should receive his proper amount of said assets, and alleges Rude's refusal to receive the same.

Paragraph VII (p. 21, trans.) again denies any lien in Rude.

Paragraph VIII alleges Rude is not in court with clean hands; that his entire pretended cause of action is fraudulent; that Rude is seeking in effect to enforce as against Buchhalter, the pretended note for $67,500.00, which was not a bona fide instrument, and which was agreed by Rude never to be enforced; that Rude seeks to impose a personal liabilty against Buchhalter instead of accepting his proper share of the proceeds of the sale, and that Rude is seeking to impose not only upon all of the

defendants, but on the court as well; that in equity and good conscience the bill should be dismissed, and corresponding relief is prayed.

The remaining defendants, The First National Bank and Messrs. Blount, Silverstein and Rosner, filed separate answers (pp. 26-29; and pp. 22-26, trans.).

The First National Bank denied (p. 26, trans.,) either for want of knowledge or absolutely, almost all the material allegations of Rude's bill. It admitted its receipt of the escrow proceeds (cash and bonds heretofore mentioned) and that the same were held by it until Rude and Buchhalter had agreed in writing as to the disposition thereof. It admitted the cash disbursements to the parties, as stated in the bill, alleged that on January 2, 1930, Buchhalter had assigned to the bank all of his right, title and interest in the escrow to secure an indebtedness of $1,250.00; alleged that no demand had ever been made by Rude upon the bank to sell the said escrow proceeds, as by him alleged, and further averred that if such demand had been made, compliance would have been refused; admitted that the firm of Blount, Silverstein and Rosner had attached said escrow proceeds as against both Rude and Buchhalter, and set forth that the lien of those defendants was secondary to that of the bank; whereupon the bank prayed "for instructions of this court as to the disposition of said cash and bonds" and for general relief.

Messrs. Blount, Silverstein and Rosner answered the bill at some length (pp. 22-26, trans.). Like

both Buchhalter and The First National Bank, they denied practically *in toto* the truth of the material allegations of the bill. It will be recalled that Mr. Rude charged in his bill that these defendants had attached the escrow proceeds "with full knowledge of said defendants, and each of them, of the rights of plaintiff and of all the matters set forth in this bill"; they particularly denied the validity of the $67,500.00 note made the basis of suit; alleged it to have been, between Rude and Buchhalter, absolutely fictitious, without consideration; that it represented no personal indebtedness as between Buchhalter and Rude and that the latter received it upon the express agreement and condition that he would never seek or attempt to enforce either it or the purported trust deed of coincident execution; that it should never pass from his possession save to be destroyed in the event of a sale of the properties which the trust deed purported to cover; or, if eventually there was no such sale, that this note and trust deed should also be destroyed and that it was the agreement between Buchhalter and Rude that their respective interests, as theretofor existing in the said properties, should be wholly unaffected by this paper transaction. These defendants particularly denied that Rude had or ever possessed any lien or rights or interests, as claimed by him in his bill, and denied any knowledge whatsoever on their part of any such pretended rights or interests, as attempted to be asserted, and upon the contrary, alleged that the plaintiff never was possessed thereof. Dismissal was prayed.

All answers were under oath.

*The Issue.*

Stripping the case of its immaterialities and details, it will be perceived that there was, by the pleadings thus presented for the court's determination, the question whether the alleged note of August 29, 1929, from Buchhalter to Rude, in the sum of $67,500.00, represented an obligation to Rude, or whether it did not; and if it did, whether Buchhalter promised Rude at The First National Bank on November 18, 1929, to pay (p. 3, trans.; Par. V bill) "the full amount of said note and accrued interest in cash in the sum of $67,500.00 plus accrued interest, together with $7,500.00 which Buchhalter had agreed to pay at the time of the conveyance of the property," and to such end, promised to sell his private collateral in order to make such payment to Rude, and until so paid, Rude should have a lien upon the entire escrow proceeds in gratification of such asserted personal obligation.

Or whether:

Abandoning and repudiating the escrow agreement, Rude came into court with unclean hands in the attempt to convert an interest in the escrow proceeds into a personal obligation against Buchhalter through the medium of a fictitious note and trust deed and thus become possessed, if he could, of the entire proceeds, and more.

*Further Statement of Case.*

At this juncture it seems pertinent to repeat that long before the institution of Rude's suit, the validity of the $92,500.00 of bonds in escrow in The First National Bank was, and all during the pend-

ency of this case continued to be, involved in litigation in the Supreme Court of Colorado, and hence the bonds were without market and of wholly problematical value (p. 72, trans.).

Due to the dispute of these parties over this transaction or otherwise, a pronounced acrimonious condition arose between Rude and Buchhalter and it was Rude's boast on the witness stand (p. 79, trans.) that it was his intention to "break" Buchhalter, as it had been his prior boast to the witness Rosner (p. 99, trans.) that he was going to "get" Buchhalter at whatever cost and that he knew the note in suit was fictitious.

Another sidelight on the purposes and motives of the plaintiff is afforded in the fact that he wrote to the wife of the defendant Buchhalter, prior to the institution of this litigation, that unless a settlement "satisfactory" to himself was made, adverse publicity for the whole family would ensue (p. 79, trans.) (Defendant's Ex. 5; p. 229, trans.), and that they would be "dragged through the mire."

Such were the issues and sidelights at the outset of the trial. At its conclusion, counsel for the plaintiff abandoned the note as the basis of liability against Buchhalter (p. 187, trans.) and attempted to substitute as the basis of recovery, the alleged oral promise stated by Rude to have been made to him by Buchhalter at The First National Bank on November 18, 1929, but Rude's allegations and testimony in that regard were to the effect (pp. 68, 69, 75, 80, 84, trans.) that Buchhalter merely promised

to pay the balance of the note, and contended that it was at all times a valid instrument (p. 75, trans.).

The plaintiff rested no less than twice in this cause (pp. 70, 88, 94, trans.). Upon the first occasion, a motion was interposed by the defendants to dismiss because no prima facie case had been established (p. 70, trans.). This motion was not ruled. Upon resting the second time, a similar motion was made (p. 88, trans.), but still not ruled. Upon resumption of trial at the second session and with new counsel, leave was asked and granted, over emphatic objection, to reopen the case for the purpose of introducing further testimony by the plaintiff Rude (pp. 89-94, trans.). On this occasion, two and one-half months subsequent to the first session, Rude undertook to supply testimony to meet the objections made in the motion to dismiss. Prior to this occasion, he had nowhere testified that Buchhalter had ever promised him a lien upon the escrow funds and bonds, nor was such ever hinted at or intimated by him at any time while on the stand, and hence the record, to that juncture, was necessarily destitute of any testimony respecting the right of Rude to go into equity, the object of his suit having been to foreclose a lien.

The court, however, permitted this testimony to be received and to remain in the record as against a motion to strike (p. 92, trans.), notwithstanding the fact that Rude had twice previously testified (pp. 81 and 86, trans.) that he had given the entire bank conversation, or all that he could remember. The court's perusal of this astonishing testimony

is respectfully invited. It is to be found as stated, at pages 89-94, transcript.

The trial was finally concluded November 6, 1930. The court, after taking the case under advisement for some three months, on January 30, 1931, handed down his memorandum (pp. 255-262, trans.), directing the dismissal of the case as to all the defendants. The plaintiff got leave to file, and subsequently presented, a petition for rehearing, such petition being directed not to the decree, as practice requires, but to the memorandum. The petition was overruled. The defendant Buchhalter tendered findings of fact (pp. 38-43, trans.), concurred in and approved by defendant The First National Bank, drafted in conceived accord with not only the court's memorandum, but the facts and the law applicable. These tendered findings were rejected. After numerous appearances and much discussion, the findings appearing at pages 43-44, transcript, were finally entered and a short decree (p. 45, trans.) was signed, dismissing the case at plaintiff's cost.

To this decree there was filed, in behalf of the defendant Buchhalter, a motion to amend or modify (pp. 45-47, trans.), and seeking to have the court dissolve the escrow in The First National Bank and direct that institution to turn over to Buchhalter the funds and bonds held by it, as heretofore indicated. The court likewise refused this motion and the case ended, leaving the parties in all respects as though the suit had never been instituted, other, perhaps, than to preclude Rude from filing anew

his identical bill. In consequence, Buchhalter perfected an appeal to the Circuit Court of Appeals seeking the entry of the rejected findings of fact and the dissolution of the escrow under the unclean hands doctrine, and Rude likewise appealed.

*The Theory of the Plaintiff's Case as Made by the Bill and the Evidence.*

It is, we respectfully submit, incontrovertible that the case, as attempted to be made, was founded upon the note of August 29, 1929, in the sum of $67,500.00 plus the sum of $7,500.00, or a total of $75,000.00.

Paragraph II (p. 2, trans.), of the bill alleges the transfer of the property and the execution of the note in consideration of that transfer.

Paragraph V (p. 3, trans.) of the bill alleges Buchhalter's promise to pay Rude "the full amount of his note and accrued interest * * * together with $7,500.00, which Buchhalter had agreed to pay at the time of the conveyance of the property hereinbefore described, plus interest at the rate of eight per cent per annum from the date of said sale to Binstock."

The suit purports to give credit (p. 4, trans.) upon the amount of the note ($67,500.00 plus $7,500.00), crediting the sum of $16,365.34 drawn by Rude from The First National Bank of Denver, or a balance of $59,699.61. The prayer for judgment is in that sum (p. 6, trans.). No suggestion of indebtedness from Buchhalter to Rude is even faintly intimated, save upon the basis of the validity of

the note and the actuality of the transfer of the property from Rude's name to that of Buchhalter. No contract, no promise to pay is mentioned save as it is founded upon the note given, as it is alleged, for the transfer of the property, and such was the whole and complete theory, not only of the bill but of the answer as well and all of the evidence, both on behalf of the plaintiff as well as that on behalf of the defendants.

We turn to the record for Rude's testimony on direct examination (p. 59, trans.):

> "He (Buchhalter) guaranteed me inside of a week he would have it all cash and the note would be paid out."

Rude states, in identifying the note in question, Plaintiff's Exhibit D (p. 60, trans.):

> "That is the note given me for the amount of money for the transfer."

And on the same page, Rude swears he told Buchhalter:

> "You know I wouldn't foreclose on you if the property is not sold in six months; that I will extend the note."

Again on page 6, transcript:

> "That I should let him (Buchhalter) have the money he owes to the bank and he will take up all the securities and pay me the full of the note."
>
> "Q. He would pay you the full $67,500?

"A. Yes. * * * he is going to sell some of his collateral and pay me in full."

And for further testimony see pages 74-75, transcript, cross-examination of Rude, where he makes particular other references to the note, and where he again asserts its validity and says he promised to extend, and not foreclose it. And yet again, at page 76, transcript, the following appears:

(Cross-Examination)

"Q. So you claim it was a valid deal at all times, this particular deal?

A. Yes, sir.

Q. And this note was a valid note from the time given, up until now?

A. Yes, sir.

Q. That is your contention?

A. Yes, sir."

And yet again (p. 80, trans.) Mr. Rude states he was to get $67,500.00 plus attorneys' fees, etc.; and at page 84, transcript, the same Mr. Rude testifies as follows:

"Q. Did you ever tell Mr. Silverstein anything in relation to your dispute with Mr. Buchhalter, that you were relying on this note?

A. I had a long conversation with him. I don't know what particular incidents. We were talking about two hours.

Q. Did you tell him Mr. Buchhalter wouldn't pay the note?

A. That he wouldn't pay the note as we agreed in the bank; that he backed out."

And finally, see page 69, transcript:

(Direct Examination)

"Q. Mr. Rude, state what Mr. Buchhalter said relative to paying you the balance due on your note.

A. He says he is going to sell $25,000 worth of bonds to a man by the name of Mr. Hurd in the morning, and in addition to that, he is going to sell some of his collateral and pay me in full."

The tenor of Rude's whole rebuttal testimony was to adhere to the note and its validity, and there was no suggestion at any time during the progress of the trial that we were to be called upon to meet the contentions found in italicized words on page 37 of Rude's brief, on certiorari, that "The suit was not on the note."

*Rude's Testimony Reviewed.*

Notwithstanding that the suit is upon the note for $67,500.00, and its pretended obligation, Rude's own testimony shows that the dispute is, in fact, of a different character. One Bronstine and himself had acquired at Master's Sale, properties of the old Colorado Pulp and Paper Company (p. 58, trans.). He and Mr. Bronstine were, and until the so-called Binstock deal, had been, under contract with respect thereto (Plaintiff's Exhibit A., p. 189, trans.). The details are unnecessary at this juncture. Buchhalter was a silent associate with Rude in his purchase

(p. 58, trans.). As between themselves, their interests were fifty-fifty (p. 196, trans., Ex. B). Rude carried Buchhalter's interest, as trustee, from the date of the Master's Sale early in June, to August 16, 1929 (p. 47, trans.) without Buchhalter possessing any written evidence whatsoever of his interest (p. 73, trans.). Commencing about June (p. 73, trans.), until the latter part of August, 1929, Rude endeavored many times to sell both his and Buchhalter's interests to Mr. Bronstine, but without success; that Rude retired (p. 59, trans.) because Buchhalter said if title was in his name he would make a sale to Mr. Bronstine; that Buchhalter thought he would make a sale within forty-eight hours (bottom p. 58, trans.). Page 59, transcript, Rude asserts that Buchhalter said he would make a sale in twenty-four hours. Further (p. 59, trans.), that Buchhalter "should handle the proposition himself if he feels so sure he is going to make a sale"; and again (p. 74, trans.) Rude admits that he entered into a "campaign against Bronstine" to induce a purchase by the latter; states that the mortgage in question was placed on the property to "make Bronstine buy", and because he got tired of being harassed and worried by Buchhalter as to what he should do with Bronstine.

Without adverting to other and similar testimony in the record, sufficient appears to conclusively establish that the object of the dealings between Buchhalter and Rude *inter sese* was to effectuate a sale to Bronstine. Then what happens? Rude conveys the entire interest to Buchhalter as of date August 29, 1929, craftily procuring the note and

mortgage in question. This transfer was in violation of an agreement between Rude and Bronstine that Buchhalter should not be in the management (p. 72, trans.). Nothing happened immediately, save that Buchhalter undertook to take forcible possession from Bronstine (p. 62, trans.). An encounter ensued (p. 62, trans.), immediately after which, Rude states that he told Buchhalter (p. 62, trans.): "You go and get Morris Block, and that is the only thing left now, for you to get Morris Block, and I believe you can get a sale out of Bronstine. He is the only man that can arrange a sale now."

It then developed that Block had already been trying to negotiate a sale to one Binstock, an associate of Bronstine's (pp. 62-63, trans.). Mr. Block reported (p. 63, trans.) that he had a proposition of "$38,000.00 in cash and the balance in bonds"; that the total sale price was to be the amount invested "that *we* had behind the property" (p. 63, trans.); that Rude and Buchhalter discussed the proposition in the following way (p. 63, trans.):

(Buchhalter): "What do you think of that deal?" "I says, 'as far as I am concerned, for my share, if I was to make a sale, I wouldn't take any bonds. I would take no bonds'." "Morris Block said, 'That is out of the question. You can't get cash. They haven't got cash. You can only get what they have got'." "I says, 'He can do what he wants'." "He (Buchhalter) said, 'Will you take bonds for your half?'" "No," I said, "I don't want any bonds, but I will do this. If you will give me $40,000 I will take the balance in a note from you for the balance of the account."

There is no suggestion that Buchhalter agreed to the foregoing. Rude states what he wanted and what he did not want. The most that is even suggested respecting Buchhalter in this matter is to the effect, apparently in an effort to please (p. 65, trans.), that he tried to get more cash. In any event, prior to leaving the city Rude left a release of the trust deed, executed a few days before, so that the deal might be consummated, but retained the note for $67,500.00 in his possession.

This discussion and the release of the trust deed took place a very few days after August 29, 1929, the date of the pretended transfer to Buchhalter (p. 62, trans.), and the date of the $67,500.00 note, and immediately after Buchhalter's attempt to take forcible possession, and we find Rude urging that Mr. Block's good offices be invoked to make a sale, and we find him discussing what he would take for his "share" and for his "half". He wanted $40,000 in cash and the balance in a note. For what? For the payment of the $67,500.00 note? Not at all. In payment for his half, and admits the $67,500.00 note or the $75,000.00 "letter" was not discussed (p. 65, trans.).

Can it be concluded that there then or ever existed any obligation from Buchhalter to Rude, as respects the note? If there were no note, there was no suit as pleaded. Upon any aspect of ordinary human conduct, would a man who had just sold to another in any bona fide transaction, be arguing what he would take for his "share" or for his "half" of the property to be further sold? His note, if he had it, was the measure of his rights.

There was never any agreement even hinted at by Rude that the note was to be paid out of proceeds, either bonds or cash. The note was for a period of six months, hence to mature February 29, 1930.

The foregoing establishes beyond the likelihood of successful dispute, that the suit, as instituted, was baseless; that there was no note nor any promise to pay it. Up to this juncture we are indebted to Rude alone for all this information. But let us pursue his story and note its contradictions, inconsistencies and inherent probabilities.

After initial discussions regarding the proposed Binstock deal and the leaving of a release of the trust deed, Rude departed Denver. On October 12, 1929 (p. 64, trans.), he received a telegram from Mr. Silverstein, requesting the note so that the Binstock deal might be concluded. Instead of complying direct, the note is sent to The Denver National Bank by Rude, under instructions (p. 220, trans., Ex. 1-9) by letter, indicating that he now, and for the first time since its pretended making, lays claim to it as an obligation. Hitherto the whole discussion with Buchhalter and Block was respecting a sale of his "share", his "interest", his "half". He arrives in Denver, he tells us, on the morning of Monday, November 18, 1929 (p. 67, trans.) seeing Buchhalter on his arrival. Not one word of testimony is given as to any conversations, discussions or pretended agreements from the arrival until 4:30 p. m. that day, when the parties went to the bank (p. 67, trans.). The court was asked to believe that these two men, after a day in each other's society, waited until arrival at the bank at 4:30

in the afternoon to enter into the agreement testified to, the whole taking place in about five minutes, and when Mr. Rogers' (the Vice President of that institution) back was turned! The transaction was one of magnitude. Rude had been absent; he had telegraphed, written and telephoned, inquiring as to the progress of the Binstock deal. He arrives in the morning, is with Buchhalter all day, and the only agreement with relation to the deal, the subject matter of, and the reason for, his presence in Denver, was a few minutes in the bank at 4:30 p. m., when Mr. Rogers momentarily absented himself! That is only one of the preposterous situations set forth as a ground for recovery.

But passing that, here, in detail, is what he says transpired (p. 68, trans.): "Buchhalter called Mr. Rogers to bring out the papers. He asked for the papers * * *, and while Mr. Rogers went back to get the papers Mr. Buchhalter says, 'I want you to let me have some of that money. I have got a large bundle of securities here—so I can go out in the morning and sell it and give you the balance due'." That a $16,000 check (round numbers) was drawn to both Buchhalter and Rude (p. 68, trans.), and both Rude and Buchhalter receipted to the bank therefor, jointly (Defendants' Exhibit 16; p. 236, trans.). That $11,615.00 of the $28,000.00 in the bank was also issued to both; that this sum was applied to an indebtedness owed the bank by Buchhalter. Then we have the following revelation (p. 68, trans.), direct examination of Mr. Rude:

"Q. What did Mr. Buchhalter say regarding the payment of the balance that was due you?

A. He would pay me the balance in the morning.

Q. In cash?

A. In cash, but would not give me a note for the balance—because I was supposed to get $40,000."

This last testimony is almost pathetic in its falsity. Here he says that Buchhalter would not give him a further note because he was supposed to get $40,000—and the suit was to enforce a lien for the payment of a balance of $60,000, round numbers, on a $67,500 note. What can be made of such testimony?

And yet another feature of the alleged bank conversation. Rude is silent. Buchhalter does all the talking, all the agreeing, all the promising—Rude does nothing but receive those promises—no argument, no protest, no debate, no discussion, no revelation to Mr. Rogers nor any one else, of either Buchhalter's indebtedness to him or of the lien, or anything else. We submit that transactions such as that do not take place in real life.

At the many different places in the record where Rude testified concerning the bank conversation, nowhere did he even once so much as intimate that Buchhalter agreed to a lien or that any such subject was ever discussed, save when, at the instance of new counsel, taking the stand after having rested, in order to escape the effect of the defense motion to dismiss (pp. 91-93, trans.).

At page 69, transcript, he states: "The bonds were left with the bank." Yet the suit is to establish a lien upon the bonds per contract. On cross-examination (p. 81, trans.) he again testifies to the bank conversation, but nowhere refers to or suggests any promise or contract for a lien (p. 86, trans.). On particular and minute examination, examining counsel, specifically having it in mind to develop whether the matter of lien had ever been discussed, Rude testifies that he has given the entire conversation, the "main points", the "gist of it", and upon examination by the Court respecting it, stated that he had given "all that he can remember". Yet, after two and one-half months' recess and the acquisition of new counsel, he retakes the stand to testify that at the same time and place, and in the same bank conversation, many times theretofore testified to by him, it was the agreement with Buchhalter that he should have a lien, saying variously that he called his counsel's attention to the situation, that he had not previously testified respecting the so-called lien, and then that his new counsel called his attention to it (pp. 91-93, trans.). He claims that he first discovered the omission upon reading the transcript on the train; later asserted he told his counsel about it, and his counsel told him about it. What can be thought of this matter? Is it humanly possible to accord good faith or honesty to such testimony? Is it humanly possible to say, wholly irrespective of any other phase of the case, that Rude's testimony carries any conviction whatsoever, other than that of its own falsity?

But why, if Rude was to be paid cash the next

morning, could or would any conversation arise in the ordinary course of human conduct, respecting any lien; is it natural or likely or conceivable, as men do business, that a promise to pay the next morning would be supported by the additional promise of a lien over night, especially when the escrow was held subject to the joint order, and the written directions of both parties? Is such a situation as Rude's afterthoughts disclose, within the range or the limits of normal conduct? Is it likely, if Rude had an agreement with Buchhalter, either for a lien, or, for that matter, to be paid in cash the next morning, that he would not have told Mr. Rogers about it? Why was Mr. Rogers so completely disposed of during the entire alleged agreement? No word was said before Mr. Rogers "went back to get the papers". No word was said after Mr. Rogers returned with the papers, only silence, and the surrender of Buchhalter's collateral and the issuance of a cashier's check jointly to both parties.

But let us proceed. Messrs. Buchhalter and Rude were together all that evening, the evening of November 18, 1929 (p. 69, trans.); that Mr. Block joined the meeting at Rude's personal request (p. 81, trans.). On cross-examination (p. 81, trans.) regarding this, Rude testified that nothing was discussed "except the attorneys' fees"; that nothing was agreed to (p. 82, trans.); that he wanted Mr. Block to put down certain figures; that Mr. Block refused to do so, notably a $14,000.00 item (p. 83, trans.); that the only basis upon which he would participate in attorneys' fees to Messrs. Blount, Silverstein and Rosner was that Buchhalter should put back the

sum of $14,000.00 "that he had made a profit in the paper mill claims". But how does this conform to what happened? On the very next day, on November 19, 1929, the day after drawing down the money from The First National Bank, the day after the alleged promise of the lien, the very day in which Rude says Buchhalter promised to pay him "the balance in full of his note" by the sale of collateral on the market, we find the parties in Mr. Silverstein's office, paying him $5,000.00 (p. 81, trans.) and signing a written promise, along with Buchhalter, to pay the remaining $10,000.00. Defendants' Exhibit 15 (pp. 235-6, trans.) is the Silverstein bill, in effect an account stated, approved by both Rude and Buchhalter, and dated November 19, 1929, and acknowledging the receipt, as of that date, of $5,000.00 on account. But what does Rude say respecting this $5,000.00? He states that it was another loan to Buchhalter (pp. 87, 88, trans.). Think of it! On this, the 19th day of November, 1929, the very day on which Rude says Buchhalter was to pay to him in cash the large sum of approximately $60,000.00, we find him "loaning" Buchhalter $5,000.00 more, taking no note or other evidence of indebtedness at all, and never making demand therefor—never, he says, never conversing with Buchhalter again (p. 88, trans.). Can it be believed Rude would loan Buchhalter anything further whatsoever, when Buchhalter was on that very day in arrears of the payment of about $60,000.00?

But let us pursue this $5,000.00 transaction a step farther. He states that the last time he ever communicated to Buchhalter was "that night", which

would be November 19, 1929. The record shows that on November 22, 1929, Rude wrote Buchhalter a letter agreeing that Block should have $500.00 commission for negotiating the Binstock deal. This letter was offered in evidence, as Defendants' Exhibit No. 7. This was four days after the alleged promise of Mr. Buchhalter "to pay the balance of the note" the next morning. This was four days after the alleged promise for a lien. This Exhibit 7 reads:

> "November 22, 1929.
>
> "Mr. J. Buchhalter, Denver, Colorado.
>
> "Dear Sir:
>
> "I am agreeable that Morris Block should receive $500.00 for services rendered in connection with the sale of the mill for which I agree to stand one-half or $250.00.
>
> (Signed) I. RUDE."

The receipt on the bottom of this exhibit shows that Mr. Block received the $500.00 at the hands of Buchhalter, doubtless in reliance upon Rude's promise to stand "one-half". If Buchhalter was indebted to Rude on the note, or for that matter in any other personal way in connection with the sale of the mill, why should Rude stand one-half or any other proportion of the commission exacted for the sale of the property? If the hypothesis of the parties' relations was as Rude pleaded and testified, to-wit, a sale to Buchhalter, and the execution of a valid note, assuredly Rude would have spurned the payment for services to Mr. Block in further disposing of the property, and more specifically would

he have done so at a time when Buchhalter was four or five days in default of paying him the sum of $60,000. If Buchhalter was indebted to Rude for the balance of a $67,500.00 note plus the further item of $7,500 besides, it is beyond comprehension to even surmise why he should bear one-half the expense of disposition, either at all or especially under the circumstances at the time set forth, and also at a time when Buchhalter, according to Rude, had borrowed the further sum of $5,000.00 from him. Amazing recital!

But that is far from all. On this same date, November 22, 1929, we find Messrs. Rude and Buchhalter signing, along with Messrs. Blount, Silverstein and Rosner, and Mr. Rosenbaum as a witness, a declaration reading, in part, as follows (Defendants' Ex. 8) (pp. 229-230, trans.):

> "Inasmuch as a controversy has arisen between I. Rude and Joseph Buchhalter concerning the proceeds resulting from the sale of their interests in the assets of the Colorado Pulp Mill, in which are involved $92,500 in bonds of The Colorado Paper Products Company,"

etc.; that the *status quo* of said bonds should remain without change for a period of thirty days; that Messrs. Blount, Silverstein and Rosner should take no action respecting their bill for attorneys' fees, etc.

Does not the foregoing conclusively negative Rude's testimony that he had had nothing further to do with Buchhalter after November 19, 1929?

Does not the recital that the dispute is over "the proceeds resulting from a sale of their interests" conclusively establish that there is not and was not any note whatsoever involved? If Rude was then claiming the payment of a note and had been promised the payment of its balance, and had been promised a lien on the bonds, is it conceivable, as men do business, that he would have subscribed recitals such as the foregoing?

But yet again, in Rude's only communication to the bank, after all these alleged agreements, he says in Defendant's Exhibit 13 (pp. 234-235, trans.), under date of January 20, 1930, that he wishes to advise the bank "that certain difficulties have arisen between Joseph Buchhalter and myself with respect to the bonds of The Colorado Paper Products Company, and moneys derived therefrom, which you now hold in escrow, subject to the joint direction of myself and Joseph Buchhalter. You are therefore hereby instructed not to do anything or make any release in connection with said escrow, except on my written order" and asked to be notified "in the event you receive any papers, notice or other information in regard to the above escrow." So it appears over his own signature that as late as January 20, 1930, or two months and two days after the alleged promise of a lien, and after the alleged promise of payment in full of his note (the payment to be made on November 19, 1929) he still kept the secret locked within his breast, that Buchhalter had promised to pay him the balance due on the note for $67,500.00, by the sale of collateral on November 19, 1929, and that he had by promise, a lien on the escrow to

secure such alleged payment. If the alleged agreements with Buchhalter were true, why the profound secrecy about them, why accept from the bank a cashier's check to the joint order of Buchhalter and himself, without protest or remark? Why sign a joint receipt to the bank for that sum without protest or remark? Why, never at any time communicate to the bank or anyone else the secret of the lien, and the promise to pay the balance of the note? Why the occasion for giving a lien over night on an escrow held subject to joint order? Why the occasion of discussing a further note, as Rude says (p. 85, trans.), if Rude was to be paid the next morning? Why, on November 22, 1929, promise to pay one-half of the commission? Why, on November 22, 1929, subscribe recitals that a dispute had arisen over the sale of their interests if there was or had ever been any such promise to pay, or any lien given, or if Rude's hypothesis is true in any particular? The answer, perforce necessity, is that Rude's whole story is completely baseless, wholly false.

But to trace a few more devastating inconsistencies (p. 78, trans.).

Cross-Examination.

"Q. Did you ever tell Buchhalter you wanted him to buy those bonds?

A. Buchhalter agreed to buy the bonds.

Q. When did he agree?

A. He agreed on the night of September 3rd or 4th.

Q. Then they were your bonds?

A. They was my bonds. They were the only bonds in question. I told Mr. Buchhalter before that, when the deal was approached by Mr. Block, that I will not take any bonds in payment of my note."

It will be remembered that on August 29, 1929, Rude made the transfer to Buchhalter and received the note in question, yet on September 3rd or 4th he claims to own bonds that were not yet in existence, and did not come into existence until the closing of the Binstock deal in October, and asserts Buchhalter agreed to buy those bonds. He owned the bonds, Buchhalter agreed to buy the bonds, and yet he would not take them in payment of his note. We leave it to this Honorable Court to analyze this, if it can. We confess our own inability to do so, except he intends to testify he was to get bonds which Buchhalter was to buy from him. Such, of course, was not the case attempted to be made, either in pleadings or testimony. It again decisively demonstrates that there was no valid note as between the parties. There was no personal obligation. Rude simply wanted Buchhalter to take his share of the bonds off his hands for cash. His suit on the note becomes worse than reprehensible. It crossed the border line of criminality.

But yet another inconsistency. Rude recites (p. 80, trans.): "I didn't expect any profits but I paid out $2,500 attorneys' fees * * *. I was to get the money that I laid out for attorneys' fees in addition"; and then states: "I was to be getting about $70,000."

Buchhalter had an investment of about $59,000 (p. 117 trans.), and Rude, $61,000; yet Rude was to have returned to him attorney's fees, making a total coming to him, he says, of $70,000, out of a total of $120,000, his to be all cash, Buchhalter to retain bonds for which an offer of seventy-five cents on the dollar had been received. But we find Rude, notwithstanding he was to have $2,500 attorneys' fees returned to him by Buchhalter, agreeing, along with Buchhalter, to pay Messrs. Blount, Silverstein and Rosner $15,000 (Defendants' Ex. 15), and we find him writing a letter to Buchhalter under date of August 16, 1929 (Plaintiff's Ex. B) (p. 196, trans.), that they, Buchhalter and himself, are in the deal on a "fifty-fifty" basis!

But yet another inconsistency. Under date of September 17, 1929, or about three weeks after the transfer to Buchhalter and the execution of the pretended $67,500 note, Rude, in defendants' Ex. 3 (p. 227, trans.) writes to Mr. Bronstine that he is at all times "ready, able and willing to carry out that agreement (the agreement of May 14, 1929, between Bronstine and Rude) * * * so far as my part is concerned".

Reference to the agreement mentioned (Plaintiff's Ex. A) (p. 189, *et seq.*, trans.) discloses that amongst other requirements, the parties, Rude and Bronstine, agree (paragraph 8) to make advances of further capital if necessary to operate the mill. Such, Rude says, he is ready to do, notwithstanding the transfer to Buchhalter as of August 29, 1929.

*Mr. Rude's Story is Inherently Improbable.*

We have seen that the validity of the bonds in question, or rather, the legality of the Master's sale, whereon the bonds rest, is and ever since and very shortly subsequent to such sale has been, in litigation in the Supreme Court of the State of Colorado, and which question still awaits determination (p. 72, trans., Rude's testimony). We learn that the only offer made for the bonds ever to be received by Rude was seventy-five cents on the dollar (p. 80, trans.). We have seen that Rude's investment was $61,000 and that Buchhalter's was and is about $59,000. We know that in the first half of the month of November, 1929, there ensued the greatest stock market collapse in economic history. Yet, in the midst of this disaster, according to Rude, Buchhalter promised him at The First National Bank on November 18, 1929, that he, Buchhalter, would sell sufficient personal securities on the next day's demoralized market so as to realize the enormous sum of $60,000, and thus pay in full "the balance of the note." Is it likely, stock market crash or not, that Buchhalter, if sane, ever made such a promise or contract? His desire to retain litigated bonds, for which seventy-five cents on the dollar had been offered, could have hardly been so intense.

Let us examine this further in the light of attending conditions. We ask, leaving, for the moment, out of discussion every other consideration, such as to what Buchhalter would have left to represent his investment if he were to pay Rude, under any circumstances, the amount the latter states, is it in the range of human probability that in the

very midst of actual world-wide financial distress, pregnant with threats and fears of worse, that Buchhalter would tell Rude that he would dump enough collateral on a panic-stricken market to realize in one day, one morning in fact, the sum of $60,000 principal and interest in order that Rude might go his satisfied way, while he, Buchhalter, retained, as consolation, some bonds, the validity and worth of which were in dispute and all this at the cost of a staggering amount of other collateral? Rude testifies to such promise on Buchhalter's part, as of date November 18, 1929, and under the conditions stated. But, for argument's sake, let us eliminate the market condition. The total sale price was $120,500, $92,500 in bonds and $28,000 in cash. Let us assume it was all cash; according to Rude's story he was to receive $60,000 plus the $16,000 already received—round figures $75,000 to $76,000—out of $120,000. In other words, for a $61,000 investment he was to receive $75,000 or $76,000. Buchhalter, for a $59,000 investment, was to receive about $45,000 and was to reimburse Rude for attorneys' fees also. What becomes of intelligence if one is to accept that?

But let us drop the assumption of cash and adopt the story as Rude relates it, that he was to receive $75,000 or $76,000 in cash, and Buchhalter was to retain the bonds for whatever they may develop to be worth—much, little, or nothing. This involves a further examination of Rude's "evidence." If he, Rude, was to receive $60,000 the "next morning" and the bonds are worth but seventy-five cents on the dollar, it would have taken practically every

bond in escrow to realize the amount Rude seeks, assuming any market could be found at all under the financial conditions then present and the pendency of a suit respecting the validity of the bonds. Again, we respectfully ask, what becomes of intelligence if one is to accept that as having been the agreement between these two men?

In summary, the circumstances, prohibitive of even the speculative truth of any of Rude's contentions, are—pendency of the case in the Supreme Court affecting the very existence of the bonds, the market conditions, and the inherent, utter unreasonableness of the story related.

And besides all the foregoing, equity would not enforce such a contract, if true. Such a contract would be unconscionable, inequitable, unfair and unjust. No such contract, however established, has ever yet been enforced in equity. *Dalzell v. Dueber Mfg. Co.*, 149 U. S. 315-325. Rude's case, however, so far from having been established, is destitute of even argumentative plausibility.

Before discussing the evidence in defense, we briefly comment further on Mr. Rude's case as attempted to be made by himself.

We have seen (Par. VI bill; p. 5, trans.), that the escrow is held "until such time as Joseph Buchhalter and I. Rude have agreed in writing concerning the disposition thereof." This, of course, merges all prior oral agreements, if any, between the parties. It merges Mr. Rude's demands for cash instead of bonds. It merges all and singular the nebulous discussion in Block's presence. It merges Buch-

halter's agreement, if any (which there was none) to buy Rude's share of the bonds. The testimony referred to was introduced only to show Rude's utterly inconsistent position—dealing with the property after he had claimed to have parted with it—and then suing on the note. That contract to dispose of the proceeds, as the parties agreed in writing, continued to be in force until Rude's repudiation and disclaimer of it—a repudiation of record when he sued The First National Bank, and made them parties here, on the ground that they would not violate this escrow agreement at his instance and request. Had his desire to break Buchhalter and his cupidity been less intense, the escrow agreement would doubtless be in force and effect. But that is now necessarily out of the case.

Buchhalter is not charged with fraud either in pleadings or proof. He is only charged with failure to keep an alleged oral promise to pay the amount of a cancelled note alleged to have been valid. The only fraud apparent in the case is Rude's attempt to perpetrate one. The true character of the dispute, notwithstanding Rude's many sworn assertions to the contrary, narrows down to his disappointment that there were so many bonds and so little cash, or that Buchhalter would not take his share of the bonds off his hands, and to gratify his animosity he deliberately and corruptly adopted the note in question as a method calculated to destroy his adversary; he was going to "break" Buchhalter (p. 79, trans). His action is wholly transparent: his vision was to sue on the note so craftily procured, and in the event of success in that respect,

he would have succeeded in effectuating his announced purposes. It was a pretty picture that he envisioned. It is repeated, Rude has undertaken to practice a fraud, not only upon the Court, but upon each and every of the defendants as well. He was not only not content in his attempt to break Buchhalter; he desired to deprive The First National Bank and Messrs. Blount, Silverstein and Rosner of their claims as well.

Mr. Rude is not corroborated by a single word of testimony, by a single circumstance, or a single exhibit. On the contrary, his own testimony, all the circumstances and all exhibits conjoin to deny either the alleged indebtedness of Buchhalter to himself or the existence of any contract or agreement for a lien. Further, they conjoin to demonstrate that he unquestionably seeks to perpetrate an enormous fraud by use of the writs, processes and functions of a Court of Equity.

Thus far we have addressed ourselves solely to Rude's testimony and the exhibits, just as though no defense testimony had been offered. We now take up, with what brevity we may,

## THE EVIDENCE IN DEFENSE.

The first witness called was

*David Rosner* (p. 94, trans.):

one of the defendants and a member of the firm of Blount, Silverstein and Rosner. He states that he is well acquainted with both Messrs. Rude and Buchhalter, and that his firm had long been engaged to render professional services for both of

them. He states that he has heard Mr. Rude's entire testimony; that he knows the pleadings in the case and the circumstances of the execution of the note for $67,500.00, bearing date August 29th, 1929, and that his first contact with that matter was on the evening of August 28th, when at about 8:30 P. M. he received a telephone call from Mr. Rude, asking him to come to the office of Mr. Buchhalter in the Roosevelt Hotel, with which request he complied; that upon arriving there he heard a discussion between the two, of certain difficulties they were having with Mr. Bronstine, whereupon Mr. Rude suggested giving a mortgage and note to Mr. Buchhalter; that Mr. Rude stated as his reasons for such a move was because he was worried that there was apt to be a partition suit brought by Mr. Bronstine, his partner in the mill; that the witness asked Mr. Rude what the consideration was going to be for such a note and mortgage and Mr. Rude stated that there was going to be no consideration (p. 96, trans.); he said it was merely a fictitious note and mortgage for the purpose of stopping any law suit Mr. Bronstine might bring against Mr. Rude; that both Messrs. Buchhalter and Rude asked the witness' opinion as to such a move, and they were told by the witness that he did not agree with them, and that he would not draw a note or mortgage of that type for them, but that they had best take the matter up with his firm the next morning, which was done, Messrs. Rude, Buchhalter, Rosner and Silverstein being present, Mr. Blount joining the conference later on. That this last mentioned conference was on the 29th of August, 1929, about 10 o'clock in the morning (p. 97, trans.), whereupon

the first discussion was that Mr. Rude at first wanted himself to execute such a note and mortgage to Buchhalter; that both Buchhalter and Rude were again informed that such instruments would be of no value; that fictitious instruments of that character as proposed would not have the effect of stopping any law suit Mr. Bronstine might bring against Mr. Rude; but after more similar discussion, Messrs. Buchhalter and Rude left, returning, however, later the same morning, perhaps at about 11:30. Whereupon, Mr. Rude said that such a note and mortgage will be executed regardless of what the opinion of the firm of Blount, Silverstein and Rosner was, and that later Rude suggested that Buchhalter had better execute the note and mortgage to him for the reason that he was in business in Dallas, and would not want to have to report an apparent obligation to Dun and Bradstreet, and that then the process was reversed, and it was agreed that Buchhalter should give the note and mortgage (p. 97, trans.).

On page 98, transcript, it is again repeated by the witness that the whole discussion between Rude and Buchhalter respecting the execution of the $67,500.00 note of August 29th, 1929, was in an attempt to embarrass Mr. Bronstine in any law suit that he might bring. The witness, himself, was present (p. 98, trans.) when the note and trust deed referred to was executed and delivered to Mr. Rude; that subsequently the witness had a number of conversations with Mr. Rude, particularly one on January 19th, 1930, on a Sunday morning at the Cosmopolitan Hotel, when Mr. Rude had called him by tele-

phone to come there; that on this occasion Mr. Rude stated (p. 99, trans.) that he was "going to get Buchhalter no matter what it cost him; that he did not care whether this note and mortgage were fictitious or not, or if he knew they were and I knew they were, that he was going after him just the same." He further states that Mr. Rude admitted to him on this occasion that the note and trust deed in question were not valid instruments, but that none the less, he was going to use them against Mr. Buchhalter (p. 99, trans.). Witness was asked to arbitrate the controversy that Mr. Rude professed to have with Mr. Buchhalter; that the witness could never really understand what his controversy was.

*Testimony of George Dexter Blount:*

States that he was invited into a conference the latter part of August, 1929, in the office of Mr. Silverstein, when were present Messrs. Rude, Buchhalter, Silverstein and Rosner (p. 105, trans.), whereupon it was stated to the witness that Messrs. Rude and Buchhalter had been discussing the proposition or policy of transferring the property from one to the other and placing an encumbrance on the property in order to embarrass Mr. Bronstine, who was threatening to start a partition suit; that the plan was that "Mr. Rude would transfer his title to an undivided one-half interest in this property to Mr. Buchhalter, and Mr. Buchhalter would give Mr. Rude a mortgage back so that the title would be complicated in the event Mr. Bronstine sought to partition the property, and they had planned that out and asked me what I thought about it, and I advised very strongly against it (p. 106, trans.).

I told them it was nothing but a subterfuge, and in my opinion, a constructive fraud; that if they got into a law suit with Mr. Bronstine the whole plan would come out in evidence; that they would have to tell the truth; that I thought it was a useless and a foolish thing to do, and I told them not to do it", but both Messrs. Rude and Buchhalter said in substance that they could not see the witness' point of view; that they thought it was perfectly legitimate for them to put up this trick on Mr. Bronstine, and that such discussion continued for about half an hour by both Messrs. Rude and Buchhalter; that the whole scheme was to enter into a transaction that would "show on its face the transfer of the title to Mr. Buchhalter by Mr. Rude, and the giving of a mortgage back to secure the note"; that witness remembers no figuring or computation in his presence, and (p. 106, trans.) that both Messrs. Rude and Buchhalter stated that the object of giving the note and mortgage and the deed was to fool Mr. Bronstine.

*Testimony of Charles Rosenbaum* (p. 109, trans.):

This witness states he is an attorney at law, acquainted with both parties, having been and being the attorney for both parties. That on August 29th, 1929, Messrs. Rude and Buchhalter both went to his office in the forenoon of that day, and then proceeds as follows:

> "They explained to me that Mr. Rude and Mr. Bronstine, who held title jointly in the Colorado Pulp Company property, had been having some difficulties between them-

selves, and that they had been unable to get along together, and it was their desire that Mr. Buchhalter be substituted as the half owner, because he, Mr. Buchhalter, felt he could deal with Mr. Bronstine more and could force the matter to an issue either by causing Mr. Bronstine to buy out the other half interest, or to in some way work jointly, and they stated that if this was done they were afraid Mr. Bronstine would file suit for to partition the property, and that he, Mr. Bronstine, was then in a better position to bid in the property at a partition sale than they might be. They stated that they therefore wanted a mortgage drawn representing the approximate amount of their joint investment, and that it was their plan to give the mortgage to Mr. Rude, and asked me first to draw such a mortgage, or, first, whether I would draw such a mortgage, and, secondly, they asked my opinion as an attorney as to whether or not in a partition sale the property would have to be bid in subject to the mortgage of record, or whether the mortgagee, being a non-resident of the state, could be made a party defendant. I thereupon first advised them that I would not draw such a mortgage, and I also turned to Mr. Rude and stated 'I would not advise you to convey the property to Mr. Buchhalter'. I referred to him as Joe. 'I would not advise you to convey the property to Joe because I don't think it would come with good grace after the

understanding between yourself and Mr. Bronstine was that you would be the half owner with him, and that he would not be compelled to deal with Joe, and if this matter of the mortgage ever came into litigation you would not come into court' I believe I used the expression 'with clean hands', and I don't advise you to do this. In any event I will not participate in it by drawing any of the papers."

That Rude complained (110, trans.) that Bronstine had not treated him fairly in connection with certain insurance policies; that witness advised Rude (p. 110, trans.) against taking steps on the proposed note, but stated that he would look into the law as to making mortgagees a party defendant in the event Bronstine instituted suit; that there was discussion between Buchhalter and Rude as to the term of the proposed note and mortgage. The term of three to five years was suggested, but Buchhalter insisted that it be for either three or six months. The desire was to get their money out of the property as soon as possible. The witness repeats that he again refused to draw the mortgage, that he would have nothing to do with such a proposition; that (p. 111, trans.) the amount discussed was approximately $135,000.00, Buchhalter and Rude stating they wanted to make the mortgage so that if the property were bid in by Mr. Bronstine he would be compelled to pay it (p. 111, trans.); that the proposition was for Buchhalter to give a mortgage to Rude because the latter was a non-resident; repeats that all of this conversation transpired in August 29th, 1929; that

later in the afternoon of that date (p. 111, trans.) he was called on the telephone by either Rude or Buchhalter and asked to report what he had found in his investigations of the law as to the necessity of making the mortgagee a party; that considerably later and sometime after the 18th of November, Rude gave the witness a set of figures purporting to represent the amount he claimed against Buchhalter; that Rude showed to the witness the set of figures purporting to represent the amount he claimed against Buchhalter; that Rude showed to the witness the set of figures drawn by Mr. Block and discussed those figures with the witness and that the witness and Rude compiled certain figures from Mr. Block's figures, and that the witness gave Buchhalter a copy of the figures so compiled; that such figures were compiled for the purpose of submitting to Mr. Buchhalter, and that they were so submitted.

*Testimony of Morris H. Block:*

(p. 114, trans.) Has been long acquainted with both Messrs. Rude and Buchhalter, and negotiated the so-called Binstock deal. About the middle of September, 1929, he went to the office of Mr. Buchhalter in the Roosevelt Hotel, Messrs. Rude and Buchhalter being present, and the witness submitted the Binstock proposal for a purchase of their half interest in the paper mill; that the witness read the proposal to them. It was an offer to pay $19,000.00 in cash, one-half of the net inventory at the time of closing, and the remainder of $92,000.00 in bonds of a company to

be formed by Mr. Binstock after he had acquired the interest. "Mr. Rude said he would not accept it. He said he would not be interested in selling for part bonds"; that if he sold he would expect all cash. Mr. Buchhalter then said "Supposing that I let you have all the cash that comes into this transaction. Would that be fair?" "Well," Mr. Rude says, "No, that wouldn't be fair. It wouldn't be fair to you, Joe, but it isn't a question of fair or unfair I wouldn't sell for bonds." Later on in the conversation Mr. Rude said "But, Joe, I wouldn't stand in the way of a deal. If you want to go ahead with this deal, go ahead with it. I will take whatever cash comes in, and as for the balance I will give you six months or a year." Mr. Buchhalter said, "No, if I am to pay the cash, then I will have to have $10,000.00 more down payment from Binstock, and as for the rest of it I think perhaps I can arrange something at the bank," and I said, "Well, Mr. Binstock could not give any more cash." The meeting adjourned and nothing had been agreed upon; that Mr. Buchhalter declined the deal because he wanted $10,000.00 more in cash; that Mr. Rude declined because it offered bonds and not all cash (p. 115, trans.). Further conversations about the Binstock deal ensued, one of them the next day in the presence of Mr. Silverstein, the 18th or 19th of September, 1929, and the witness submitted to Mr. Rude three instruments for execution. They were a release of the trust deed, the bill of sale for the physical property of the paper mill and a quit claim deed. That their execution was asked so that the deal might be completed in Mr. Rude's absence. Mr. Rude executed the papers, turning them over to

Mr. Silverstein, telling Mr. Silverstein that he, Mr. Rude, would give him instructions as to the disposition later (p. 116, trans.). That a deal subsequently went through, Mr. Binstock offering to go through with the deal as originally presented, and in addition to $2,500.00 of first maturity bonds after they had been issued, after the deal was closed; that later witness presented a bill of $2,500.00 to both Messrs. Rude and Buchhalter for commission in negotiating the sale; that Mr. Rude was present at the time of presentation. Mr. Rude finally agreed to the payment of $500.00, and $500.00 more (116, trans.) if and when Mr. Rude and Mr. Buchhalter were successful in recovering certain moneys from the Receiver of the old paper mill; that the witness was paid $500.00 by Mr. Buchhalter; that Mr. Rude paid him nothing; that witness, at the request of Messrs. Buchhalter and Rude, made a set of figures showing the respective investments and interests; that the figures (p. 117, trans.) put down by witness were from data given by Mr. Rude and Mr. Buchhalter; that he figured with Mr. Buchhalter and Mr. Rude several hours and gave each a copy of his figures, and that each of them accepted them as being correct (p. 117, trans.). Mr. Buchhalter told him he had invested $58,422.32 in the old Colorado Pulp and Paper Company. Mr. Rude told him he had invested $61,000.00 in the same enterprise; Mr. Buchhalter stated that he had drawn down that afternoon from The First National Bank $11,615.22; Mr. Rude stated that he had drawn down that same day $16,365.34; that both Mr. Rude and Buchhalter stated "there was $92,000.00 worth of bonds at the bank then, and they wanted me to figure up what the

interest was to each of them and I figured out that the present investment in bonds at that time, that is, to Mr. Buchhalter was $47,212.48 (118, trans.), and that the present investment in bonds for Mr. Rude at that time was $45,000.00 * * *"; that the date of these figures was November 18th, 1929, the date the funds were withdrawn from the bank. That on this same evening Rude stated to Buchhalter that since the transaction represented a loss, Buchhalter should make some division of $17,000,00 made by him in the purchase of the claims of the old Colorado Pulp and Paper Company, Rude stating that although this was before Rude was in the transaction, and was not legally entitled to any share of that money, but in view of the fact of loss, he, Rude, felt Buchhalter should give half of the profits on those particular claims, to which Buchhalter stated that there was little profit, if any, left. He had paid out commissions, attorneys' fees, etc. Mr. Rude replied he felt he should have half of whatever there was, but that Mr. Buchhalter refused to consent to this. That (p. 119, trans.) Mr. Rude wished an item of $17,000.00 also put down, along with the other figures, one-half of which was $8,500.00, and which Rude claimed. Mr. Rude also requested a $3,000.00 item that he had received be jotted down, to leave a remainder of $5,000.00 coming to him. Such figures were put down "subject to adjustment". Buchhalter, however, gave no consent to any such request on Mr. Rude's part. Respecting the reasons given him for supplying these figures, both parties said, "Well, they said that Mr. Binstock had paid in this money and these bonds into the bank, and they wanted to know how much each one had coming in this transaction."

(p. 119, trans. ) That at the time when first the Binstock deal was presented to Mr. Rude and Mr. Buchhalter, Mr. Rude objected as follows:

> "That is a very poor deal for us. The little money they are paying in with the bond issue for so many years, it would really be in effect that they were buying this plant for a very small sum and paying us out with our own money";

that Mr. Rude further said, "I would rather put in $50,000.00 and have Mr. Buchhalter put in $50,000.00, and we will buy their interest." The conversation above referred to was in about the middle of September, 1929 (p. 119, trans.); that there was no discussion on the evening of November 18th, 1929, respecting the $67,500.00 note; that it was never mentioned.

(p. 119, trans.) *Cross-examination.* Witness states that he knew of the mortgage at the time of first attempting to negotiate the Binstock deal and secured releases from Mr. Rude (p. 120, trans.). That there was nothing said by Mr. Rude at any interview respecting money that was owing to him; that Mr. Rude stated he would not take bonds for the money he had invested as the witness understood. Witness knew nothing of any money coming to Mr. Rude. Witness recalled no reference to the $40,000.00 in cash; that witness stated Rude would not accept bonds upon the sale (p. 120, trans.). That the concluded negotiations with Binstock were in effect as originally offered. That Rude finally did not object to the original Binstock deal. He stated

that he would not stand in the way of the deal; that if Buchhalter wanted to go through with it, he should do so, and that he, Rude, would take whatever cash came in, and as to the balance he would give six months or a year.

*Testimony of William F. Rogers:*

Now for twelve years last past Vice President of The First National Bank of Denver. Is acquainted with both Messrs. Rude and Buchhalter. That The First National Bank is the escrow holder of the pulp mill assets in controversy. That no one other than the witness handled the matter for the bank (p. 122, trans.). Recalls occasion in November last when Messrs. Rude and Buchhalter called at the bank and drew down certain funds, and on that occasion Mr. Rude and Mr. Buchhalter came in and apparently were ready to close the transaction. "I simply drew up the receipt for them to sign and delivered to them the proceeds that I had. They both signed the receipt and I issued a Cashier's check jointly to both of them. They did not request it to be done that way. It was made jointly and accepted by them. I did not hear any portion of any conversation between the two respecting their respective or particular interests, in my presence. Mr. Rude did not tell me anything about his having a lien on the bonds in the bank. He has never made any demand upon me or the bank for the sale of the bonds to gratify his claim or lien. One of them, I do not recall which one, wanted to know if the bonds could remain there on escrow until they had arrived at a settlement, which I agreed to do. Both of them

were there at my desk when that was said. That is the extent of my connection with this matter."

(p. 123, trans.) On cross-examination, the witness states: "I did not know Mr. Rude and Mr. Buchhalter were going to call upon me when they did. That check, making joint payments to Mr. Rude and Mr. Buchhalter, was not done at Buchhalter's request. It is not a fact that the bank retained the difference between $16,000 plus and the $28,000 received, to recover an indebtedness which Mr. Buchhalter owed the bank. The payment was made by Mr. Buchhalter." The witness refers to some discussion relating to forty shares of Manufacturers' Trust Company stock which was purchased for Mr. Rude, which was duly delivered or forwarded to him.

*Buchhalter's Testimony* (pp. 129, trans., *et seq.*):

Respecting this defense testimony, we content ourselves by saying that it was diametrically opposed to that of the plaintiff in every material particular and was corroborated in practically every respect by the remaining defendants and the other defense witnesses.

*Testimony of Harry S. Silverstein:*

One of the defendants and a member of the firm of Blount, Silverstein and Rosner; has heard substantially all of the testimony in the case, and is familiar with the pleadings, and acquainted with Messrs. Rude and Buchhalter, and that his relationship to those parties, generally speaking, was that of attorney for some years past in connection with the Colorado Pulp and Paper mill controversies;

that some of this litigation is pending at the present time in the Colorado Supreme Court, and that there is at the present time a case so pending, involving the confirmation of the Master's sale of the pulp mill to Mr. Bronstine and Mr. Rude; that on the morning of August 29, 1929 (p. 151 *et seq.* trans.), about 9:30, Messrs. Rude and Buchhalter and Rosner entered his private office, all three reporting as to an interview they had had the night previous with Mr. Rosner and the discussion which then took place, Mr. Rude stating that he was not getting along well with Mr. Bronstine; that Mr. Rude had previously talked about some of the same matters, to the effect that he was fussing with Bronstine about where the insurance was to be placed, and concerning employees of the mill, complaining that Bronstine had excluded him from the management, etc., and that he, Rude, was tired of it, and was anxious to have Bronstine buy out his and Buchhalter's interests, and stated further, that the fear was entertained that due to such disagreements between Bronstine and Rude, a partition suit would be brought, and that they had discussed with Mr. Rosner the night before, the effect of a mortgage, whether it would put them in a more advantageous position in the event of a partition suit; that witness advised the parties that he thought it would make no difference, that he "saw nothing wrong with it," but advised against the proposed move; that there was very considerable discussion about it, and that the parties left and returned; that upon their second visit, Mr. Blount was invited into the conference and the proposition stated to him, and he likewise advised very strongly against the execution of any instruments of that kind; that

Rude and Buchhalter specifically stated that the proposed mortgage or trust deed was "with the idea of putting the title in Mr. Buchhalter's name because Mr. Rude had been unable to finally conclude negotiations for a sale, and he thought Mr. Buchhalter would be better able to do so, or anyway that it might conduce to that result"; that later this same afternoon, August 29th, 1929, Rude and Buchhalter returned and fresh grievances were stated against Bronstine, and Rude insisted that the title should be passed to Buchhalter, as he thought the latter would be better able to make a deal; that the discussion of the morning was as to Rude putting on the mortgage, but Rude subsequently stated that he could not do that, because being in business there would be an apparent indebtedness against him, and then suggested that Buchhalter should give the mortgage to him, Rude; that the parties remained in the witness' office all afternoon discussing the situation. The witness advised them the proposed move would be of no service, nor would it do Bronstine any harm; that the only possible advantage would be to give them a little more time to arrange their finances if they had to bid in at a partition sale. Witness further advised partition suit would be in equity, and the court would have the power to adjust all equities, and that the mere fact of a mortgage, whether for any consideration or not, would be adjusted, to which they both replied they wanted to go ahead anyhow, the mere question of time was sufficient; that various amounts were discussed and witness advised them it should be for some amount commensurate with the value of the property and not any excessive amount. Mr. Rude stated he thought

one-fourth interest was reasonably worth $75,000.00 on the basis of the entire mill being worth about $300,000.00, and that the consideration named was arrived at accordingly, the mortgage being given for $67,500.00. The witness reminded Mr. Rude that he was under contract with Mr. Bronstine and would have to carry it out, and advised Rude it would be advisable for him to write to Bronstine, notifying him to that effect, even though title were conveyed to Buchhalter; that otherwise Bronstine might be of opinion the deed was made merely to prevent a sale, and if Bronstine were of such opinion he might have a cause of action for damage and breach of contract. Witness also suggested to both Rude and Buchhalter that Rude should write a letter to Buchhalter stating that the note and mortgage were to be returned to him or cancelled "in the event he effected its purpose", that is, a deal was made or in the event of no partition suit. Rude stated that "he and Joe had had dealings for years and trusted each other implicitly, and that there was no need of doing that"; that witness then stated to Buchhalter "Well, you are taking a chance on that." Buchhalter replied, "I am perfectly willing, and Mr. Rude is the only man I would trust with an instrument of that kind." Mr. Rude stated "Mr. Buchhalter need not worry. The note will be cancelled and never used in any event." That the witness drew the note and trust deed in suit, and identifies Plaintiff's Exhibit D as being the instruments, and that there was no computation of Mr. Rude's interest, either principal or interest, in the presence of witness; that such was never mentioned; that witness' firm has garnishment proceedings against

the bonds in suit; that witness was never notified by Rude or any one in his behalf that Rude claimed a lien upon the bonds, or funds in the bank. Sometime subsequently, Mr. Rude, possibly in the presence of Mr. Rosenbaum, stated to the witness that he claimed a grievance against Buchhalter because the latter had not given him all of the cash received in the Binstock deal; that such was the only complaint against Buchhalter; that there was never any discussion about the issuance of this note and mortgage, and the transfer, other than on August 29th, 1929; that on this date, August 29th, witness mentioned to Rude that he should leave a signed release of the deed of trust, or signed request for release, and Rude said he would do that; that such a release was prepared later; that witness also asked Rude to leave the note in case the deal was put through, and Rude said he had sent the note to Dallas but would mail it back. Subsequently the note was sent to The Denver National Bank; that on November 18th, 1929, witness spent considerable portion of the day with Messrs. Rude and Buchhalter on the question of attorneys' fees. That the sum of $15,000.00 was agreed upon as the amount in full; that the next day Rude and Buchhalter came in and paid $5,000.00; that there was present Messrs. Rude, Buchhalter and Rosner, in addition to the witness. Rude drew a check to Buchhalter, that either witness or Mr. Rosner, or both, asked as to why it was being made out to Buchhalter. Rude said something about having his own reasons for it, whereupon the witness objected and required that the check should express on its face what it was for, and an endorsement was made on the check in Rude's presence,

while he was sitting there at the table across from the witness.

*Contradictions of Mr. Rude by the Defense.*

The foregoing testimony on behalf of the defense contradicts plaintiff's showing in its each and every salient phase. There is within its purview, no room in this case for any of his recitals. We will, however, descend to a few details.

Mr. Silverstein's testimony is not even attempted to be refuted or rebutted. The latter tells us definitely and flatly and absolutely that the note and trust deed set forth in suit and offered in evidence were simulated and pretended instruments between Buchhalter and Rude. He tells us that the whole transaction was a plan or a scheme, whereby, in their conception, they would be afforded some advantage as against Bronstine, and to such effect also is the testimony of all the other witnesses testifying on this subject, to-wit: Mr. Buchhalter, Mr. Rosner, Mr. Blount and Mr. Rosenbaum.

Mr. Silverstein further tells us that he was never at any time consulted on such a scheme or plan until August 29, 1929—neither before nor after. Mr. Rude swears the note and trust deed in question were at all times valid. On the final day of the hearing of this cause, he continued to make the same contentions, undertaking to deny Buchhalter's testimony as to the conditional delivery of the note or his promise to return or destroy it.

Mr. Rude swears that there was prior discussion (p. 73, trans.) about a deal along the same lines, which first discussion was with reference to a

so-called illegitimate deal (p. 74, trans.), but that the one in suit was actually genuine.

Mr. Rude swears that this so-called illegitimate deal was taken up with Mr. Rosenbaum prior to August 29, 1929 (p. 76, trans.). Mr. Rosenbaum swears it was on August 29th (p. 112, trans.).

Mr. Rude swears that Mr. Rosenbaum approved the deal in suit, the $67,500 note and trust deed (p. 76, trans.), and Mr. Rosenbaum swears (p. 109 *et seq.*, trans.) that he was never consulted but one time, and that was on August 29, 1929, and that the whole proposition laid before him by Mr. Buchhalter and Mr. Rude was a fictitious transaction, and that he disapproved and advised against it.

Mr. Rude swears (p. 76, trans.) that Mr. Rosenbaum was not asked to draw the papers. Mr. Rosenbaum swears that he was asked to do so and declined (p. 111, trans.).

Mr. Rude swears the only discussion with Messrs. Block and Buchhalter on the evening of November 18, 1929, was with relation to attorneys' fees (p. 81, trans.). Mr. Block swears (p. 117, trans.) that the whole computation was with respect to the parties' investment, and their then interests in the escrow.

Mr. Rude swears (p. 84, trans.) he told Mr. Silverstein that Mr. Buchhalter "wouldn't pay the note as we agreed in the bank." Mr. Silverstein swears that the only complaint Mr. Rude ever made to him against Mr. Buchhalter was to the effect that Mr. Buchhalter was to give him all the cash in the

Binstock transaction and had not done so (p. 155, trans.).

Mr. Rude swears (p. 74, trans.) that on August 29th, 1929, in Mr. Silverstein's office, and in his presence, it was agreed with Mr. Buchhalter that he, Rude, was to take "a note for the actual amount" of Rude's investment on August 29th, and that it was then figured up what was coming to him. Mr. Silverstein swears (p. 155, trans.) that no such computation ever took place, nor any other portion of such alleged agreement—that the whole proposed plan and scheme was fictitious as between the parties.

Mr. Rude swears (p. 75, trans) that when the $67,500.00 note was delivered to him by Mr. Buchhalter, that Mr. Buchhalter did not say that he, Rude, was the only man in the world to whom he would deliver such a note that was not real, but that Mr. Buchhalter said "he wouldn't deliver a note for $67,-500.00 on such short terms but to me. To the term being short my answer was that if the note came due he wouldn't worry. I wouldn't foreclose (p. 75, trans.). I would extend it," and that this was all said in Mr. Silverstein's presence. Respecting the foregoing Mr. Silverstein testifies (p. 155, trans.): "I suggested to both of them that Mr. Rude should write a letter to Mr. Buchhalter stating that the note and mortgage would be returned to him or cancelled in the event he effected its purpose, that is, a deal was made, or in the event of no partition suit, and Mr. Rude stated that he and Joe had had dealings for years and trusted each other implicitly, and there was no need of doing that. I said to Mr. Buchhalter 'Well, you are taking a chance

on that' and Mr. Buchhalter said 'I am perfectly willing and Mr. Rude is the only man I would trust with an instrument of that kind.' Mr. Rude stated at that time that he need not worry, in case a deal was made or no partition suit brought he would cancel the note, and it would never be used in any event."

Mr. Rude swears (p. 81, trans.) and in some half dozen other places in the record, that it was agreed at The First National Bank on November 18th, 1929, that he should be paid in full the next morning by sale of Mr. Buchhalter's private collateral, and some two and one-half months later (p. 93, trans.), that he was to have a lien for the balance of his note. All such alleged agreements stated to have taken place when Mr. Rogers' back was turned.

Mr. Rogers swears (p. 123, trans.), "Mr. Rude did not tell me anything about his having a lien on the bonds in the bank. He has never made any demand upon me or the bank for the sale of the bonds to gratify the lien. One of them, I don't recall which one, wanted to know if the bonds could remain there on escrow until *they had arrived at a settlement*, which I agreed to do. Both of them were at my desk when that was said."

Mr. Rude swears (p. 80, trans.) that Mr. Rogers was not asked whether the bonds could remain in the bank until himself and Mr. Buchhalter arrived at a settlement; that nothing like that was said; that Mr. Rogers said, "I am leaving $100.00 for escrow fee, which will be adjusted later. * * * He said he was taking the fee to be adjusted later."

Mr. Rude swears (p. 166, trans.) that he never mentioned to either Mr. Rosner or Mr. Buchhalter that he would give a mortgage to Mr. Buchhalter, because he had the property in his own name anyway. Mr. Silverstein swears (p. 153, trans.); "There had been a discussion in the morning as to Mr. Rude putting on the mortgage, and he stated he could not do that because, being in business, he had to make a statement, and it would not be good for his business to show an indebtedness, and suggested that Mr. Buchhalter should give him the mortgage." All of this in Mr. Buchhalter's presence, as well as that of Mr. Rosner.

(p. 178, trans.) Mr. Rude swears that he never stated to Mr. Buchhalter that he had any idea of putting on the mortgage on account of a partition suit. Mr. Rosenbaum swears (p. 110, trans.) that such was one of the reasons discussed with him by Mr. Buchhalter and Mr. Rude on the morning of August 29, 1929, and Mr. Silverstein (at page 152, trans.), swears to the same thing, and so does Mr. Blount (at page 105, trans.).

Mr. Rude swears that he did not call Mr. Rosner on the phone on the evening of August 28, 1929, when the matter of the fictitious note and trust deed was first discussed, and says (p. 166, trans.): "I don't remember ever seeing him there at all." Mr. Rosner is supported by Buchhalter (on p. 131, trans.) and by Mr. Silverstein (p. 152, trans.), testifying to Mr. Rude's admission to the conference of the night before with Mr. Buchhalter and Mr. Rosner.

Mr. Rude swears (p. 99, trans.) that he never spoke to Buchhalter after the alleged $5,000 loan on November 19, 1921. Mr. Block testifies that Rude was present with Buchhalter at the discussion regarding his commission, which we have seen to be November 22, 1929.

But why pursue contradictions further? This presentation has already transcended all limits originally intended.

We briefly call this Honorable Court's attention to the various attempts made by Mr. Rude's counsel to shut out all testimony respecting the execution of the note for $67,500, and cannot refrain from the observation that notwithstanding the bill of complaint, why, if that note and trust deed are not in this case, such frantic efforts were put forth to keep the facts from the court's knowledge or consideration? We refer to p. 95, trans. (Rosner's testimony), for the first objection:

> "Mr. Morris: * * * We object to the evidence that is sought to be elicited, for the second reason that it is sought here to adduce evidence in contradiction to the terms of a written instrument, namely, the note that has been mentioned, which cannot be varied or altered by parol."

P. 96, trans. (Rosner's testimony.) The same objection, with the request to be heard.

P. 98, trans. The same objection.

P. 99, trans. The same objection and protracted argument.

P. 105, trans. (Blount's testimony.) The same objection.

P. 111, trans. (Rosenbaum's testimony.) The same objection.

P. 156, trans. Testimony of Mr. Silverstein respecting the note and trust deed. Moves that testimony be stricken out because it tends to vary the force and effect of written instruments.

We have not noted them all, but there are perhaps a dozen objections to the evidence seeking to establish the invalidity of the note and trust deed in question, and approximately as many arguments, only to find, at the close of the case (p. 187, trans.), that the "note is abandoned" by Rude's counsel as the basis of liability of Buchhalter to Rude. And now it is asserted that the "suit was not upon the note". To adhere to that statement is the equivalent of admitting that there was no suit at all! We note further that there was no attempt to rebut or refute the testimony of Mr. Silverstein, Mr. Rosner, Mr. Blount and Mr. Rosenbaum in that regard, although a series of denials on the part of Rude was put forth on his last occasion on the witness stand (p. 175 *et seq.*, trans.), respecting the testimony of Buchhalter. All this is a remarkable shift of position when one remembers the allegations of the bill, and further, that Mr. Rude's sole testimony respecting Buchhalter's alleged liability to him was on that hypothesis, that is, the hypothesis of the absolute and unimpeachable integrity of the note.

Of course, Messrs. Blount, Silverstein and Rosner, having been made defendants because they were

charged with full knowledge of the truth of all the allegations of the bill, were, in their own defense, entitled to show the invalidity of an instrument to which they were not parties, when the same was set up in an attempt to defeat their rights. And in addition to all this, as elsewhere pointed out, Rude's own testimony defeated his suit.

Such, may it please the Court, is the record in this cause on which Rude asked the Court of Appeals to declare him a proportionate owner of the escrow and to distribute the proceeds accordingly.

It is again respectfully submitted that Rude is destitute of right to raise any question presented by his petition.

*The Unclean Hands Maxim.*

But we pass to a consideration of the defense interposed to Rude's entire suit, namely, that he was not in court with clean hands. Elaborate or detailed discussion cannot be necessary. The record bristles with the petitioner's bad faith. We confidently characterize the litigation as a fictitious suit on a fictitious instrument and deliberately intended to have been such and undertaken to be supported by testimony false in its practical entirety.

This Honorable Court is of course fully aware of the doctrine and all its implications and it is with a feeling of apology that we offer cases on the subject. However, for convenience, references to a few adjudications will be made. No case approaching a parallel in facts has come to our attention, but since the doctrine is suited to and fits every sort of

reprehensible conduct, one expression of the rule is about as pertinent as another. We respectfully refer, first, to the case of

*Weegham v. Killefer*, 215 Fed. 168, 171; affirmed C. C. A. 6:

> "The principle embodied in the maxim, 'He who comes into equity must come with clean hands,' is a cardinal one lying at the foundation of equity jurisprudence. Equity imperatively demands of suitors in its courts fair dealing and righteous conduct with reference to the matters concerning which they seek relief. He who has acted in bad faith, resorted to trickery and deception, or been guilty of fraud, injustice, or unfairness will appeal in vain to a court of conscience, even though in his wrongdoing he may have kept himself strictly 'within the law.' Misconduct which will bar relief in a court of equity need not necessarily be of such nature as to be punishable as a crime or to constitute the basis of legal action. Under this maxim, any willful act in regard to the matter in litigation, which would be condemned and pronounced wrongful by honest and fair-minded men, will be sufficient to make the hands of the applicant unclean. Both court and text writers have repeatedly spoken upon this subject in no uncertain lauguage.
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> "In Michigan Pipe Co. v. Fremont Ditch, Pipe Line & Reservoir Co., 111 Fed. 284-287, the Circuit Court of Appeals of the Eighth Circuit, speaking by Judge Sanborn, said:

"'A suit in equity is an appeal for relief to the moral sense of the chancelor. A court of equity is the forum of conscience. Nothing but good faith, the obligations of duty and reasonable diligence will move it to action. Its decree is the exercise of discretion, not of an arbitrary and fickle will, but of a wise judicial discretion, controlled and guided by the established rules and principles of equity jurisprudence. One of the most salutary of these principles is expressed by the maxims, "He who comes into a court of equity must come with clean hands," and "He who has done iniquity cannot have equity." A court of equity will leave to his remedy at law—will refuse to interfere to grant relief to—one who, in the matter or transaction concerning which he seeks its aid, has been wanting in good faith, honesty or righteous dealing. While in a proper case it acts upon the conscience of a defendant to compel him to do that which is just and right, it repels from its precincts remediless the complainant who has been guilty of bad faith, fraud, or any unconscionable act in the transaction which forms the basis of his suit.'

"In Deweese v. Reinhard, 165 U. S. 386, 17 Sup. Ct. 340, 41 L. E. 757, Mr. Justice Brewer, speaking for the court, said:

"'A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may

make of them in a court of law, he will be held remediless in a court of equity.'

"In Larcheid v. Hashek Mfg. Co., 142 Wis. 172, 175, 125 N. W. 442, 443 (20 Ann. Cas. 576), the Supreme Court of Wisconsin said:

" 'The exclusion of a plaintiff from the peculiar favors of courts of equity results equally where his conduct has been unconscionable by reason of a *bad motive,* or where the result in any degree induced by his conduct will be unconscionable either in the benefit to himself or the injury to others.'

"Mr. Pomeroy, in his work on Equity Jurisprudence, Sections 398, 400 and 404, says:

" 'Whatever may be the strictly accurate theory concerning the nature of equitable interference, the principle established from the earliest days, that while a court of chancery could interpose and compel a defendant to comply with the dictates of conscience and good faith with regard to matters outside of the strict rules of law, or even in contradiction to these rules, while it could act upon the conscience of the defendant and force him to do right and justice, it would never thus interfere on behalf of a plaintiff whose own conduct in connection with the same matter or transaction had been unconscientious or unjust, or marked by a want of good faith, or had violated any of the principles of equity and righteous dealing which it is the purpose of the jurisdiction to sustain. While a court

of equity endeavors to promote and enforce justice, good faith, uprightness, fairness and conscientiousness, on the part of the parties who occupy a defensive position in judicial controversies, it no less stringently demands the same from the litigant parties who come before it as plaintiffs or actors in such controversies.

" 'A contract may be perfectly valid and binding at law; it may be of a class which brings it within the equitable jurisdiction, because the legal remedy is inadequate; but, if the plaintiff's conduct in obtaining it, or acting under it, has been unconscientious, inequitable, or characterized by bad faith, a court of equity will refuse him the remedy of a specific performance, and will leave him to his legal remedy by action for damages.

" 'It is not alone fraud or illegality which will prevent a suitor from entering a court of equity; *any really unconscientious conduct*, connected with the controversy to which he is a party, will repel him from the forum whose very foundation is good conscience'." (Italics ours.)

"Mr. Eaton, in his work on Equity, at page 74, says:

" 'The maxim applies not only to fraudulent and illegal transactions, but to any unrighteous, unconscientious, or oppressive conduct by one seeking equitable interference in his own behalf. A court of equity will not decree the specific performance of a contract

> unless it is strictly equitable, and free from trickery and deception on the part of the party seeking such performance. Even if the inequity of the plaintiff is insufficient to warrant the court in cancelling the contract, yet the plaintiff may be refused its enforcement. And equity will refuse its aid in the enforcement of a contract where the plaintiff has practiced fraud on the defendant, and also where the plaintiff has been guilty of unconscionable conduct which does not amount to legal fraud'."
>
> "Authorities to the same effect might be multiplied indefinitely. The foregoing will suffice to state and to define the universally accepted and adopted rule upon this subject. The principle thus broadly enunciated is not confined in its application to controversies of any particular nature or class, but extends generally to all cases cognizable by courts of equity."

Another expression of the rule is found in *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, p. 227:

> "Those who come into a court of equity, seeking equity, must come with pure hands and a pure conscience. If they claim relief against the fraud of others, they must themselves be free from the imputation."

And the rule has found constant recognition by this court.

In the case of *International News Service v. Associated Press*, 248 U. S. 215, 245, while it was held the facts there involved were not sufficient to invoke

the doctrine, that none the less, if a complainant's attitude is unconscientious or inequitable towards his adversary so as to fix upon him the taint of unclean hands, he is debarred from relief.

And perhaps the last expression this court has had occasion to make on this subject is found in *National Fire Insurance Co. v. Thompson*, 281 U. S. 331-338. It is there said (p. 338):

> "Courts of equity frequently decline to interfere on behalf of a complainant whose attitude is unconscientious in respect to the matter concerning which it seeks relief."

In the case of *Primeau v. Granfield*, 193 Fed. 911 (C. C. A. 2), the Court of Appeals, of its own motion and in the absence of the question having been raised either by counsel or the court below, took notice of the unclean nature of the complainant's controversy and rejected its adjudication *sua sponte* on the broad ground of public policy.

Now how does the doctrine apply to the case of this man Rude? In the first instance, he has told us (p. 74, trans.) that the negotiations for sale to his associate Bronstine, in the mill purchase, having been unsuccessful, the scheme was hit upon "to make Bronstine buy;" that such was one of the purposes of the $67,500.00 mortgage in question. It is a fair construction of the record that he induced Buchhalter to execute the $67,500.00 note and mortgage in order to practice that oppression on his partner and associate, Bronstine.

Subsequently, and in the month of September,

1929, a dispute arose between Rude and Buchhalter over the "cash" in the deal. This dispute, however, did not become acrimonious until November, 1929, when Rude arrived in Denver for the purpose of receiving his share of the proceeds.

In time his animosity knew no limits. In December, 1929, he addressed a letter to the wife of the respondent Buchhalter, making the sinister threat of adverse publicity for the whole family if a "satisfactory settlement" with him were not made. He tells Mrs. Buchhalter that they will be "dragged through the mire" (p. 227, trans.).

At the trial, and in the obvious attempt to effectuate that threat through the medium of so-called character witnesses, he attempts to besmirch Buchhalter, who he had previously testified was his bosom friend of many years standing and in whom he had implicit confidence. One of these so-called character witnesses, one Levy (p. 172, trans.), admitted his unfriendliness to Buchhalter; another, one Hershey (p. 169, trans.), was a politician, whose reason for testifying was obviously untrue, and who really knew nothing about it; another, one Van Schaack (p. 170, trans.), who admitted his testimony was due to the request of one F. G. Bonfils, publisher of the Denver Post, and against whom defendant Buchhalter had pending a suit for libel (p. 79, trans.), and one Tracy (p. 161, trans.), who founded his opinion of Buchhalter's reputation on the naked fact that a corporation with which Buchhalter had been connected was slow in paying some of its bills.

Further, Rude came into court swearing to an

alleged further indebtedness of $5,000.00 on Buchhalter's part to him, which was not only transparently false, but was also refuted by all of the principal defendants in the case.

Rude went into court admitting his boast to "break" Buchhalter (p. 79, trans.). He went into court boasting that Buchhalter had "met his match" at this time (p. 79, trans.). And all this, as just noted, against a man who had been his devoted friend (p. 73, trans.) of long standing.

But, worst of all, and, we submit, beyond the right of any court of equity to condone, this man Rude went into court, using as the basis of his pretended cause of action a promissory note in the sum of $67,500.00 that his own testimony disclosed had no place in his case, and concerning which, the other defendants, whose rights he also sought to destroy through the medium of that note, more than overwhelmed him on his assertions as to its validity. And the defendant Rosner (p. 101, trans.) testified that prior to the institution of his suit, Rude admitted that he knew the note in question possessed no validity, but that he was going to employ it against Buchhalter notwithstanding; that he was going to "get" Buchhalter, no matter what the cost.

It would seem that if up to now there existed no such doctrine as unclean hands, it would, under the noisome facts of this case, be necessary to invent and apply it.

Judge McDermott, in his opinion on that phase of the matter, was in undoubted error. He confused,

if we may respectfully so say, the doctrine of "forfeiture" with the unclean hands principle. The two are not even remotely related. If they were, the one would have always destroyed the other and the unclean hands doctrine would not exist. And Judge McDermott seemed to think also that to apply the doctrine would be taking property from one pair of unclean hands and giving it to another. Again he was plainly in error. It is true that Buchhalter's execution of the $67,500.00 note in question was far from commendable, nor certainly is it commended. We think, none the less, that the record shows that he was the dupe of his then great friend Rude, whom he implicitly trusted and whose adroitness and perspicacity in accumlation he admired. His confidence in this man Rude was such that he declined to exact from him at the time of the delivery of the note (as advised by Mr. Silverstein) a letter reciting that it was never to represent an obligation.

But aside from such matters, Buchhalter did not go into court. His answer and his testimony were frank, fair and honest. The doctrine has no application to such a defendant. It operates only to debar from relief the unclean complainant.

We have seen again and again that Rude, in his attempt to get a large personal judgment and "lien" and thus to absorb and appropriate unto himself the entire escrow proceeds, on his oath disclaimed all interest by way of ownership therein, save by way of "lien."

Accordingly, it is again respectfully urged, if the Honorable Court of Appeals erred at all, it was

in undertaking to adjudicate Rude's rights and to have awarded him anything whatsoever, other than to give him leave to sue at law, as he might be advised. The escrow should have been dissolved so far as Rude is concerned. The mere fact that it was in the hands of a third person could not serve to enlarge the rights of the unclean litigant. Such would nullify the doctrine. Had the proceeds all been in Buchhalter's hands, the doctrine would operate to leave them there, so far as equity is concerned. We again submit that Rude exhausted his equitable rights and remedies by his unconscionable conduct. This result imperatively ensues from sheer principle.

Such is the result if the unclean hands doctrine is to find application. And if it be not applied, then litigants may institute at will in the courts of equity of the United States all the "groundless" and "unconscionable" claims they may please, supported by false testimony, and failing, through litigious hazard or the ability of defendants to successfully defend, they will nevertheless find themselves invested with their actual interests on the strength of defensive allegation and proof. There is, if your Honors please, no such doctrine as that, unless the case at bar establish it.

## CONCLUSION.

If the Court of Appeals was right in assuming to award Rude an interest in the escrow, notwithstanding it also found his claims, as asserted, to have been groundless, his conduct unconscionable and his testimony materially false, then, it is submitted that the maxim, "He who seeks equity must do equity," constitutes its full authorization to award respond-

ents reimbursement for their outlay, out of the funds in escrow in litigation, and hence in the custody of the court. We have seen, in Section I of this brief, the many and varying instances under special facts, in which a like procedure has been followed. A contrary holding would accord the fee bill statute the effect of being a limitation upon the exercise of what has long been regarded as the inherent powers of a court of equity. To now strip the courts of the power so long exercised would, we submit, as previously stated, be little short of revolutionary. The fee bill statute either applies to every instance of attorney's fee allowance in the Federal equity courts, or it applies to none. Neither reason nor logic occurs to us, at least, to justify or support a distinction. If exceptions are to be made, they must rest on something other than an arbitrary or anomalous foundation. If the first construction of the statute—the Greenough case, *supra*—holding that it did not apply to instances of the recovery or preservation of trust funds was error, it is now too late to alter it, in view of the long line of cases that have followed in its wake. If that construction was correct, sound reason cannot now be assigned for permitting the statute to operate as an invasion of what so long has been regarded as within the inherent powers of equity courts in other instances.

If, therefore, as stated, this Honorable Court shall conclude the Court of Appeals was correct in assuming to adjudicate Rude's rights, its holding should be in all things affirmed.

However, if this Honorable Court shall conclude

that the cause, instead, is one for the operation and the application of the unclean hands doctrine, the question of an attorney's fee allowance becomes moot in this case. On our part, and on this latter phase of the case, it is submitted that the escrow should be dissolved in Buchhalter's favor, subject to the rights, if any, of the other respondents, and Rude be remitted to his action at law. Otherwise, no matter how false one's testimony, howsoever corrupt his motives, howsoever fictitious his suit, howsoever groundless his claims, howsoever unconscionable his conduct, howsoever great his trifling with the courts, he will still be awarded his rights of adjudication. This is in conflict with all principles of equity. Such a doctrine is too dangerous to exchange for the unclean hands maxim. It throws down the bars to perjury and to fraud. It casts upon courts and defendants a dangerous burden that they might not in every case be able to discharge, and hence might make in many instances, courts of conscience the unwitting or the helpless instrument of corruption. The instant case is an example. The litigious spirit of the petitioner Rude is exhibited by his very application to this Court. Notwithstanding the astonishing record in this cause and the findings of the Court of Appeals thereon (solemnly arrived at by twice reading the record), Rude still insists that, willy-nilly, he must be invested, free from condition, with that which he falsely swore he did not own. And in view none the less, of his shocking attempt to destroy an adversary, he was given relief not to be found within his pleadings, his testimony or his prayer. He cannot complaint of that, especially when he urged the

Court of Appeals to award it to him. He complains because he was taxed with his adversaries' outlay, corruptly occasioned by himself.

With great respect, we insistently urge that the results of his own invocation, to-wit, the unclean hands doctrine, be now applied to him, and that an end be forever put to this controversy so far as the escrow in suit is concerned.

HENRY E. LUTZ,
*Counsel for Respondents Buchhalter, Blount, Silverstein and Rosner.*

# SUPREME COURT OF THE UNITED STATES.

No. 736.—October Term, 1931.

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| I. Rude, Petitioner, *vs.* Joseph Buchhalter. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit. |

[May 23, 1932.]

Mr. Justice Butler delivered the opinion of the Court.

This suit was brought in the federal court for Colorado by petitioner against respondent, the First National Bank of Denver, and the members of a law firm to obtain judgment against respondent on an oral promise to pay a large sum and to establish and foreclose a lien therefor upon certain bonds and cash held by the bank in escrow. The principal controversy was between petitioner and respondent. The bank claimed a lien on the fund to secure payment of a small sum owing to it by respondent. The lawyers asserted a claim under an attachment to enforce payment of an amount to be fixed as their compensation for services in a proceeding in the state court. After trial at which much evidence was heard the court dismissed the complaint on the merits. Respondent appealed and petitioner took a cross appeal. On respondent's appeal the Circuit Court of Appeals remanded with instructions for further proceedings in the district court and on petitioner's appeal affirmed. 54 F. (2d) 834.

This writ brings here for review the part of the decree directing the district court to deduct from petitioner's share of the fund in escrow the expenses, including reasonable attorneys' fees to be fixed by the district court, to which respondent and the bank have been put in this litigation.

The evidence and findings disclose facts, occurring before those alleged in petitioner's complaint, that shed light upon the question presented. In June, 1929, at a state court receiver's sale he and one Bronstine each bought an undivided half of the property of the Colorado Pulp and Paper Company. The purchase price was

paid in cash and in bonds of that company. Under an agreement between petitioner and respondent the former furnished $61,000 and the latter $53,922 making the total required to pay for the half interest bought by petitioner. It was transferred to petitioner and later a quarter interest was conveyed by him to respondent. Possession of the property was given to Bronstine who carried on the business for account of all concerned. Petitioner and respondent wanted to sell their interest and, in order to force Bronstine to buy them out, they pursued a course of hostile and threatening criticism of his management. And when a partition suit by Bronstine seemed imminent they, conspiring to embarrass and delay him should he seek relief by that means, falsely made it to appear of record that a quarter interest in the property was subject to a heavy incumbrance. For that purpose they caused to be made and recorded a deed transferring petitioner's quarter interest to respondent and also a trust deed to the public trustee purporting to secure a note made by respondent to petitioner for $67,500. Respondent soon succeeded in selling the half interest to one Binstock, an associate of Bronstine, for $28,080 in cash and $92,500 in bonds of the Colorado Paper Products Company. Petitioner, as a condition of clearing the title of record, required that all the cash and bonds should be delivered to the bank to be held in escrow until he and respondent should agree in writing as to the disposition of the same. They promptly divided nearly all of the cash, but came to no agreement for division of the remaining money or the bonds.

Later, petitioner brought this suit claiming that the fictitious note and trust deed were valid and alleging that, when the cash was divided, respondent promised to pay him the full amount of the note and $7,500 out of the profits of the venture and that the bonds should be held in escrow until the balance alleged to be owing, $59,699.61, should be paid. And the complaint alleges that the lawyers had attached the interest of petitioner and respondent and claimed a prior lien on the fund. The prayer is that petitioner have judgment against respondent for the amount claimed; that the same be declared a lien upon the fund, and that the bank sell the bonds and apply the fund to the payment of the judgment. Respondent's answer alleges that the note and trust deed were fictitious, denies the alleged promise, avers that he and petitioner had

approximately equal interest in the property and that the only agreement between them was that the sale of their half interest be joint and entire and the proceeds be equally divided between them, and prays that the complaint be dismissed on the merits. The lawyers' answer asserts that they have a lien upon the fund, denies that petitioner has any, and prays that he be denied relief. The bank's answer shows that the cash and bonds were deposited with it to be held in escrow until petitioner and respondent agree in writing as to the disposition of the same, sets forth the division of the cash, alleges that respondent assigned his interest in the fund to the bank as security for the payment of $1,250 and prays that it be declared to have a first lien on the fund, be instructed as to disposition of the balance and have costs and attorneys' fees incurred in this suit.

After hearing the evidence and before making findings under Equity Rule 70½, the district court filed a memorandum showing that petitioner had failed to make out his case. Then respondent submitted requests for findings of fact and, in addition to those negativing petitioner's cause of action, asked the court to find that petitioner and he entered into a campaign against Bronstine, including the making of the fictitious note and trust deed, to create difficulties and to force Bronstine to buy their interest in the property; that, by making the note the basis of his suit, petitioner attempted to perpetrate a fraud against respondent and to impose upon the court; and that petitioner's testimony is unworthy of belief. And respondent proposed as conclusions of law that petitioner by reason of the campaign against Bronstine did not come into court with clean hands, and that the bank should be directed to deliver the entire fund to respondent subject to its lien and the claim of the lawyers. The court, refusing to adopt any such condemnatory requests, made findings merely showing the respective amounts invested in the property by petitioner and respondent; that the fictitious note had been canceled; that pursuant to agreement the proceeds of the sale were to be held by the bank in escrow until respondent and petitioner agreed in writing as to the disposition of the same; that cash had been divided and that the escrow agreement had not been modified. As its conclusion of law the court declared that the complaint should be dismissed on the merits as to all

defendants with costs to be taxed against petitioner, and entered its decree accordingly.

On his appeal respondent prayed not for reversal of any part of the decree but that it be made to declare that as against petitioner he was the owner of the fund and to direct the bank to deliver it to him. The opinion of the court clearly shows that claim to be devoid of merit. Petitioner on his cross appeal merely prayed for the relief sought in his complaint. The decree was affirmed and that ruling is not questioned here. In his brief in that court, petitioner suggested that if it held his suit was rightly dismissed below, it should direct distribution under the agreement.

First to be considered is the command of the Circuit Court of Appeals that the district court deduct from petitioner's share the "court costs and expenses to which Buchhalter" has "been put in this litigation including reasonable attorneys' fees to be determined by the trial court".

This is not a taxation of costs as between solicitor and client. Cf. *Guardian Trust Co.* v. *Kansas City Southern Ry. Co.*, 28 F. (2d) 233; 281 U. S. 1. The only costs allowed to be included in the money judgment against petitioner are those taxable as between party and party; counsel fees or other expenses not so taxable are not to be included. The Circuit Court of Appeals found that, by reason of petitioner's wrongful and fraudulent demands and bad faith in bringing and maintaining this suit, he prevented the distribution of the fund according to the escrow agreement and put respondent and the bank to the expense of making their defense against a groundless claim. It concluded that, because of such inequitable conduct, the decree should impose upon petitioner's share a lien in favor of respondent and the bank for the expenses to which they were so put.

It is significant that the trial court, though specifically requested by respondent so to do, declined to find that petitioner in bringing this suit attempted to perpetrate a fraud against respondent or to impose upon the court or that he came with unclean hands or must have known that the cause of action he alleged was without foundation in fact. Such refusal strongly suggests that the trial court who saw and heard these antagonists upon the witness stand was of opinion that no such condemnation was warranted by the evidence. Its findings appear to have been diligently restrained

to those merely sufficient to show that petitioner failed to sustain the essential allegations of his complaint. Indeed one of respondent's requests for findings reflects unwillingness on the part of petitioner to accept other than cash for his share and that there were reasons, other than matters of mere accounting, for the agreement that the cash and bonds should be held in escrow until petitioner and respondent "have agreed in writing concerning the disposition of the proceeds".

The Circuit Court of Appeals went beyond the issues presented by the record. Its opinion shows that determination of the appeals did not require findings as to the good faith of petitioner. Respondent, claiming the entire fund, necessarily opposed distribution under the agreement. A large part of the work of his attorneys is chargeable to the attempt to enforce his groundless claim to the entire fund. He made no application for a lien upon petitioner's share on account of expenses or attorneys' fees. Such allowances are not made as of course. And petitioner had no reason to apprehend that any such matter would be considered on either appeal. He had no opportunity to be heard in respect of the authority of the court to make such an allowance or as to the facts touching the propriety or basis of the same. Petition for rehearing and denial, as here, upon a reasoned opinion may not in such a matter fairly be regarded as the equivalent of a hearing in advance of decision.

The opinion below condemns the conduct of both parties in various details of the transaction out of which this litigation arose. The record discloses that when acting together in the pursuit of gain they were not governed by proper standards and that where their interests came in conflict they disregarded considerations making for fair play. Nice distinctions as to which disclosed the greater lack of good faith are not sufficient to warrant a court of equity in putting upon one any part of the expenses incurred by the other in waging such a contest. Assuming that the matter was properly before the court for consideration, we are of opinion that the record does not warrant any such allowance in favor of respondent.

The bank is not entitled as against petitioner to any allowance on account of expenses or counsel fees incurred to protect its claim against the fund to secure the debt owing by respondent

to it. But under settled principles applied in equity courts its reasonable expenses including a fair amount to pay the fees of its attorneys incurred in this suit and which are attributable to the discharge of its duty under the escrow agreement properly may be made a first charge against the fund as a whole. *United States* v. *Equitable Trust Co.*, 283 U. S. 738, 744. The decree will be modified in accordance with this opinion, and the costs in this Court will be taxed against respondent.

***Modified, and as modified affirmed.***

**A true copy.**

Test:

*Clerk, Supreme Court, U. S.*